United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
MAY 19 1976
DANIEL FUSARO, CLERK
SECOND CIRCUIT

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AFTERNOON SESSION
2:00 P.M.

E M I L P O K L I T A R, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Poklitar, one of the problems we have in this room is audibility.

THE WITNESS: Yes, sir.

THE COURT: Will you please keep your voice up so that all others can hear what you have to say . Address yourself to Mr. Baker.

MR. BAKER: Your Honor, it occurred to me just sitting here that this testimony is a little bit out of sequence.

We asked Mr. Poklitar here today to describe in a general way the problem of spontaneous use, which you raised during the first week of trial, and the other subject on which he will testify is the music study, the Schedules A, B and C, which have not yet been admitted in evidence.

THE COURT: All right. You mean you are just telling me that.

MR. BAKER: Yes, just so you can get a little perspective on it. It sort of comes at an odd point in the proceeding.

DIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Poklitar, by whom are you employed?

A CBS Television Network.

Q What is your position with the Television Network?

A I am the associate director of music operations.

Q Would you just briefly describe the scope of your responsibilities as associate director of music operations?

A Supervising the operation of the music clearance section.

Q Could you give us a brief description of what the operations of the music clearance section involves?

A It is the clearance of music which will be used on CBS Television Network programs.

Q How long have you held this position?

A Approximately three years.

Q By whom were you employed and in what position prior to that time?

A By CBS Television Network as manager of the music clearance section.

Q How did your responsibilities as manager of the music clearance section differ from your present responsibilities?

A They are essentially the same.

Q Mr. Poklitar, could you identify for us the types of CTN programming on which spontaneous use occurs?

A They occur on hard news programs and news specials, during football games, during parades and during political conventions.

Q With respect to hard news programs, could you identify the specific programs you were referring to and give us an indication of their duration and the approximate number of such programs each year?

A There is a CBS morning news, which is one hour in length, is on five days a week, so that there are approximately 250 programs per year, there is a CBS evening news with Walter Cronkite, which is 30 minutes in length five days a week, approximately 250 times a year; CBS mid-day news, which is five minutes in length, five times per week, 250 a year; the Saturday evening news with Roger Mudd, which is on once a week, approximately 52 weeks a year; and the Sunday evening news, which is 15 minutes in length once a week, approximtely 52 weeks a year.

Q I don't recall. Did you indicate the length of the Roger Mudd program?

A It is 30 minutes in length.

Q Could you describe the frequency with which

music appears on such programs?

THE COURT: Music or spontaneous music.

MR. BAKER: I will get to that in the next question, your Honor.

A With respect to specific programs?

Q Either way.

A On the Walter Cronkite show in 1972, I believe there were six such uses and in the CBS morning news I think there were 10 to 12 such uses and as to hard news specials, they have occurred quite often, but it depends --

Q We will get to the hard news specials in a moment.

THE COURT: What year was this?

THE WITNESS: 1972.

Q When you said there were six such uses was that compositions or the number of programs using music?

A Programs using music.

Q Typically, does your department receive any advance notice with respect to the use of music on hard news programs?

A It rarely if ever receives advance notice.

Q Just for the record, could you give us a couple of examples of the kinds of occasions upon which music would be used on those types of programs?

MR. TOPKIS: There were only six. Could we just know what they were?

THE COURT: If Mr. Poklitar knows.

THE WITNESS: I don't have that with me, no, sir.

THE COURT: Then tell us from what you do know what kinds of music have been used on news programs.

THE WITNESS: Yes.

A There are occasions when there is news coverage of arrivals and departures of important personages at airports, there was music used when President Nixon would arrive in Washington, there was music used when he would arrive in Peking and in Moscow, there were other occasions when there was news coverage of different events such as peace marches or other types of demonstrations, earth day activities.

THE COURT: If peace marchers were to sing "We Shall Overcome" would that be such a use?

THE WITNESS: Yes, sir, it would be.

Q I believe you also mentioned earlier that spontaneous use sometimes appear on news specials. Could you identify examples of that type of program and indicate to us the number or the approximate number of such programs each year?

A As I recall, there were 108 news specials

in 1972 and spontaneous use were used in such cases as the Apollo moon shots, we had occasion where when the astronauts lifted off from the moon they had a tape recorder which played the U. S. Air Force song, which is an ASCAP composition, and on two of the Apollo shots upon recovery of the astronauts on the aircraft carriers in each case there were bands that performed Anchors Away and U. S. Air Force, both of which are ASCAP compositions.

Q Can you give us an approximate indication of the number of news specials which contain music, either in '72 or any other form in which you can quantify the answer to that question?

A Well, in addition to those programs that I have cited, we did do coverage of the burial services of Presidents Truman and Johnson and J. Edgar Hoover, and there was music performed during those coverages.

I would say that as to the number of programs, to the best of my recollection, it would be 10 to 25.

THE COURT: How many?

THE WITNESS: 10 to 25.

Q Typically, does your department obtain advance notice with respect to the music to be used on such programs?

A No, it does not.

Q You also stated that spontaneous uses occur in the course of coverage of political conventions. Does that include anything other than Presidential nomination conventions?

A No, it does not.

Q Would you describe for us your present clearance procedures with respect to conventions?

A Yes. For each convention a band direct or and an orchestra are engaged to perform during the conventions and prior to the beginning of the convention these band directors submit to us lists of compositions which they expect may be performed during those coverages.

Q What do you do with that list?

A We then check our files to determine whether or not the compositions involved are ASCAP, SESAC, BMI, or in the public domain.

Q Do these bands ever perform music which they hve not previously notified you they expect to use?

A Yes, they do.

Q Would you give us some indication of the frequency with which that occurs?

THE COURT: I take it when we are talking about conventions we are only talking about presidential nominarion conventions, is that right?

THE WITNESS: Yes, sir.

THE COURT: So this problem only occurs twice every four years.

THE WITNESS: That's right.

MR. TOPKIS: Actually isn't this again a quantifiable thing rather than something on which we have to have estimates? It happened twice last year.

THE COURT: The number of times within each convention when it occurred we haven't yet got, but we know that there were only two major political nominating conventions broadcast by CBS TV last year, and the last one before that was four years ago.

MR. TOPKIS: Right.

THE COURT: Do you have any idea how many times this trouble arose in the Republican or Democratic conventions last year?

THE WITNESS: Yes, your Honor. Last year it arose, I believe, 21 times.

THE COURT: Combining both conventions?

THE WITNESS: Yes, combining both conventions.

THE COURT: Go ahead.

Q Are there any other sources of music with respect to which you do not receive prior notice other than the bands hired for the conventions?

A There are.

Q Would you describe those, please?

A Yes. I believe during the Democratic convention it was announced that it was Mayor Daly's birthday and the delegates burst into Happy Birthday to you.

THE COURT: It would have been cheaper to go off the air, wouldn't it?

THE WITNESS: Ther were other occasions when delegates sang compositions on the floor of the convention, there were occasions when we would switch to remote locations, such as the ballrooms of the hotels of different candidates, and in those ballrooms there would be musical groups playing compositions, there was music used at different rallies and there was music used at the airport, as I recall, when President Nixon arrived in Miami Beach.

THE COURT: May I ask you, just to get a feel for the significance of all this, does allthat you have been talking about add up to a lot of money in one year, has there been any study made as to how much this all amounts to in the conventions and otherwise?

MR. TOPKIS: It adds up to zero.

THE COURT: Because of the blanket licensing?

MR. TOPKIS: Right.

MR. HRUSKA: Zero incremental cost for the performance rights.

THE COURT: Now that I realize, I don't blame Mr. Topkis for looking puzzled.

What do you do then about it, anything in the present system? Do you report it to ASCAP or do they monitor it or what?

THE WITNESS: Yes, sir. During the conventions I assign different persons of my staff to watch our coverage of the conventions going along with the lists of the songs which the band leaders gave to us as guides as they note which compositions were performed and,as best they can, identify the compositions which were not previously submitted.

We then prepare reports on those bases and submit them to ASCAP and BMI.

THE COURT: That is really so they can decide how to distribute among their own members?

THE WITNESS: Yes.

BY MR . BAKER:

Q Mr. Poklitar, I believe you also mentioned parades as a type of programing on which spontaneous uses occur. Would you please indicate the number of parades which CTN covers a year and the number of hours of programing involved?

A We have three parades per year and they take up approximately six hours of programing.

Q Could you briefly describe the clearance procedures used for parades?

A Prior to each parade we obtain or we receive either via the parade master or the individual bands which have been engaged to appear in the parades the titles and other information, such as composer or publisher of the compositions which they anticipate they will perform at the time they are in the vicinity of our mobile unit.

Q Can you tell me the frequency with which music is picked up by the mobile unit which has not been previously cleared, previously sent to you by the procedures you have just described?

A It happens quite often.

Q If you have any way of quantifying it or giving an indication.

A It would be somewhere between 15 to 50 per cent of the time.

MR. TOPKIS: I am not sure what that means.

THE COURT: I amnot sure what it means. You don't mean that up to 50 per cent of the TV time, viewing time, is devoted to spontaneous performance of music, do you?

THE WITNESS: No, sir, I don't mean that. Of the music that is submitted, we have found that spontaneous uses consist of 15 to 50 per cent.

MR. TOPKIS: Again, isn't this something that is readily countable? The program logs are available for those three parades.

THE COURT: Yes, but apparently the witness hasn't been called and told to have the precise figures. If you want to, of course, they will be made available. However, let's get what we can while he is here.

Q I think another category you mentioned were football games which contain spontaneous use. Can you tell us approximately how many such games are broadcast each year?

A About 90 scheduled football games, plus the bowl games.

Q As to the scheduled games, are those made available to each of the affiliates on the network or is it segmented in some fashion?

A It is segmented.

Q Do I gather correctly from that that there is more than one game broadcast a week?

A Yes. Generally there are six games broadcast per week.

Q Could you describe the clearance procedures for football games?

THE COURT: To the extent they are different. I assume that you get in touch with whoever you expect to play music, such as the band leader, and ask him what he is going to play, hope for the best, and then find out that a lot more music is used.

THE WITNESS: That is correct, your Honor.

Q The next question is to what extent is music performed by the official band at a football game with respect to which you have not received prior notice?

A Here again, this happens quite frequently.

MR. TOPKIS: If your Honor please, I hate to be persnickety, but this testimony is utterly valueless. Unless we have figures we have nothing.

THE COURT: I don't think it is totally valueless. Obviously it would be made a great deal more valuable by precise figures, and I will ask CBS to produce those for us. The only thing is I don't want to call back a witness with regard to those figures if there is some way that we can get underpinning information at the present time. If we have to we will.

MR. HRUSKA: I don't think those figures are obtainable, your Honor..

I think that is one of the reasons we have cal.. Mr. Poklitar here today.

THE COURT: Then you can report to us, of cou.. that that is the case in some formal fashion.

MR. TOPKIS: Could I take the witness on voir dire, your Honor.

THE COURT: With regard to his oral testimony?

MR. TOPKIS: With regard to whether or not the a.. tual records are available.

THE COURT: Are there any records made of the use? There must be somehow or other records made, because you tell ASCAP, right, at the end of a football g.. you have used so and so.

Would there be any way you could, from the rec.. you do have, tell which of those songs were used sponta.. ously in the sense that you were not advised before the program and which were not?

There is no point in looking at .. ebody else. Y.. know the answer or somebody does.

THE WITNESS: I don't know that it would be co.. plete. One way to tell would be to see what titles we.. added in the subsequent report which were not on the

original report.

THE COURT: Right. One way is good enough. You can do it that way.

Can you do it that way?

THE WITNESS: We can try, your Honor.

THE COURT: I get a little tired of hearing people say they can try. What obstacle do you see that would prevent it from being accomplished?

THE WITNESS: I suppose we can check and re-check our files and see what numbers we come up with, actual numbers.

THE COURT: I am not sure I have made myself clear. It seems to me it ought to be a perfectly simple proposition, if I understand the way you do this. I suppose that before the game you send ASCAP a communication somehow or other and say "We are going to use The Eyes of Texas are Upon You," or whatever it may be, and then after the game is over, you let them know that in fact you also had to play Boola-Boola without expecting to.

THE WITNESS: No, sir, we don't do that.

THE COURT: Will you tell us how you do do it so we can find out what information you might be able to give?

THE WITNESS: Yes. We are given by each band director a list of the compositions which he plans to use.

We then check our files to see if the composit are ASCAP, BMI, SESAC or public domain.

We do not prepare the reports to ASCAP until a the game has been broadcast and each band director send us his second list showing--

THE COURT: Of actual use?

THE WITNESS: Actual use.

THE COURT: Then can you compare the second lis received from the band leader with the first list recei from the band leader?

THE WITNESS: Yes, sir, I suppose we can.

THE COURT: Wouldn't that net out the difference?

THE WITNESS: It probably would, yes, sir.

THE COURT: We will discuss how to accomplish th after Mr. Poklitar has concluded.

Go ahead, Mr. Baker.

BY MR. BAKER:

Q Are there any sources of spontaneous use at fo ball games other than the official band?

A There are occasions when there would be musicia seated in the stands and they would be playing compositions that were not officially engaged by the team for that pur pose, but they would be sitting there playing songs.

Q Any other source?

A There would be a case where weather condition made it impossible for the half time band that was engaged to appear, for example, if it were 23 degrees below zero in Green Bay and the youngsters couldn't play their instruments there wold be music played on a loud speaker during the half time period.

Q Other than football games, are there any other types of sporting events which are covered by CBS on which spontaneous uses occur?

A Yes, there are.

Q Could you identify those for us, please?

A We presently have a series called Sports Spectacular and on two occasions we had coverage of gymnastic events which were generally accompanied by some kind of music, either piano or record, and we had no information as to that.

MR. TOPKIS: Could we know when this was?

THE WITNESS: It was during 1973.

MR. TOPKIS: 1973?

THE WITNESS: Yes, sir.

Q Mr. Poklitar, could you describe briefly the steps involved in clearing music appearing in entertainment programs on CBS Television Network?

A Yes. Different members of my staff are assigned

various programs which would be broadcast on the networ[illegible] they receive from program packagers or producers lists [illegible] compositions which they anticipate will be included in those programs.

Q Is there any difference between the way such [illegible] are prepared as to different types of programming?

A Yes. In the case of live taped programs my s[illegible] prepares what we call music logs. In the case of film[illegible] programs we receive from the packager what we call music [illegible] sheets.

Q The music cue sheets, by whom are those made up?

A Some one at the packager's office.

Q And the logs, by whom are those made up?

A They are made up by my staff.

Q Based upon information supplied by whom?

A By the program packager.

Q After you have received the cue sheets or made [illegible] the music logs, what do you do with them next?

A We furnish copies of those to ASCAP and BMI.

Q For what purpose?

A To inform them as to what music was performed on the network.

Q Do you ever request ASCAP or BMI to supply any information with respect to the logs or cue sheets which you

give to them?

A With respect to the cue sheets, we forward to the organization two copies of each cue sheet and each organization then annotates which cues contained therein are covered by ASCAP or BMI and they return those annotated copies to us. The extra copies are retained by them

THE COURT: What do you do with that information?

THE WITNESS: We then put them in what we call series files.

THE COURT: Is it just for your use, for CBS' general understanding of how much ASCAP music they use?

Of what interest and value is that information to CBS?

THE WITNESS: It is shown that either organization has given us clearance for the music contained.

THE COURT: Solely to document clearance?

THE WITNESS: Yes.

Q Can you tell us approximately how many such reports or cue sheets are processed each year?

A In excess of 4000 per year.

THE COURT: Four or forty?

THE WITNESS: 4,000.

Q Mr. Poklitar, I would like to show you three documents labeled Plaintiff's Schedule A, Plaintiff's

Schedule B and Plaintiff's Schedule C, which were previously marked but not admitted into evidence.

Schedule A was marked as PX 835, Schedule B was marked as PX 836 and Schedule C was marked as PX 837.

Was the information contained in these schedules prepared under your direction?

A Yes, it was.

Q With respect to Schedule A, can you describe how that was prepared?

THE COURT: Will you tell me what it is first? I don't remember offhand.

MR. BAKER: Yes, your Honor.

It is a schedule which sets forth the number of ASCAP and BMI uses in the first quarter of 1970 and 1971 broken down by feature, theme and background.

A May I have your question again? I'm sorry.

Q With respect to Schedule A, could you tell us how the information in this schedule was prepared?

MR. DAVIDSON: Your Honor, we have a bit of confusion here. We have two Schedule A's. I would just like to know which one this is.

MR. BAKER: This is the one without the timings.

THE COURT: All right.

Are we all talking about the same thing now?

Would you tell us how this was prepared then, please?

A This was prepared using data generated by a s[illegible] made utilizing a computer printout.

THE COURT: Could you be a little more detailed? Will you ask the questions?

MR. BAKER: I am going to try to bring that out, your Honor.

Q You say data generated by a computer printout.

Do you know the source of the data which was fed into the computer?

A Yes. The source was music logs and cue sheets which are in our day-to-dayfiles of music used during the two periods involved.

Q Mr. Poklitar, I would like to hand you a copy of a computer printout, copies of which have previously been supplied to counsel for BMI and ASCAP -- it is dated 4-[illegible] and ask you whether this is that computer printout?

A Yes, it is.

Q Mr. Poklitar, you also stated that the data in the computer printout was processed to break it down into the categories which appear in Schedule A; I would like to also show you another report-

THE COURT: Can I make a suggestion before we [illegible]

confused, if we ever want to refer to these again, that be marked, the computer printouts, for identification 835A and B, to the extent that they refer to 835, or 837.

MR. BAKER: They refer to all three of them actually, your Honor.

THE COURT: Is 837 used? Let's call them 837 B and C, even if they are referring to others, as long as we reflect in the record what they refer to.

The one you have just had identified, the first one will be marked 835A for identification.

MR. BAKER: Fine.

May I state that that comprises the data base for 1970 as well as 1972.

THE COURT: 835-A.

MR. BAKER: Yes. It would be the second two to in the copy which has been handed to your Honor.

MR. TOPKIS: Excuse me just a second. We are lost. Which is 835-A, if I may inquire, your Honor?

(Pause.)

BY MR. BAKER:

Q Mr. Poklitar, I would like to show you a printout which we have agreed to call 835-B, and it is also dated 4-30-73, and the first page of it says, "Year 1970, ASCAP Feature," and beneath that is the total number of performances.

Is that the end product of the computer print
you were talking about which was used to prepare Sched
A?

A Yes, it is.

THE COURT: May I see what you just referred

MR. BAKER: Schedule A or the printout, your Honor?

THE COURT: You are asking whether 835 is th
product of 835A?

MR. BAKER: Whether 835A is the end product
the computer processing from which the figures on Sche
A were taken.

THE COURT: All right. That I understand.

I thought you were starting to talk about 835B a
that confused me.

MR. BAKER: Excuse me, your Honor.

You are absolutely correct. It was 835 B.

THE COURT: That is what confuses me.

What is the relationship of 835B to 835A?

MR. BAKER: 835A, your Honor, is the data base of all of the information which was fed into the computer to prepare Schedules A, B and C.

835B is the computer printout of exactly the same data which appears on Schedule A.

THE COURT: I see.

MR. BAKER: I should say for Schedule A for the year 1970.

835 C is the same printout for 1972.

THE COURT: All right.

Do you want to give those to the clerk for marking?

xx (PX 835A-B-C marked for identification.)

Q Mr. Poklitar, were Schedules B and C also prepared under your direction?

A Yes, they were.

Q By whom were those prepared?

A They were prepared by a para-professional at the Cravath firm named Miss Peggy Scott.

Q Can you describe the method by which she prepared these?

MR. TOPKIS: Your Honor, it seems to me we are out at the end when we ought to be at the beginning.

I don't think the record yet reveals where 835A came from, 835A is a computer listing of innumerable programs broadcast in the evening and music presumably broadcast on those programs, but I don't know where the listing or the record doesn't reveal where the listing that is summed up here came from.

THE COURT: That's easy to find out.

MR. BAKER: I believe it does, your Honor.

Q The information in 835A, would you tell us the source of that information?

A Yes. The source is our music logs and/or cue sheets, music cue sheets.

Q Would you describe how you got from the music log or cue sheet to that computer printout, to feeding the information into the system?

A Yes. People went through the music cue sheets and the music logs and they extracted the information as to uses on to information sheets and those sheets were then used for the purposes of making keypunch cards and those keypunch cards went into the CBS computer.

THE COURT: Let's take a given page, so I am sure I understand how this works.

I just happened by chance to pick it up at the tab which says "1970 data input."

MR. BAKER: Right.

THE COURT: The first page which I am looking at up in the right-hand corner says, "Page number 0002, run data 4-30-73," which I assume means the time when this page was made, not when the music was used.

MR. BAKER: That is correct, your Honor.

MR. TOPKIS: You don't have a page 1, your Honor.

THE COURT: Yes, but I had the back of it.

MR. TOPKIS: I beg your pardon.

THE COURT: I just happened to be looking at it.

That one says on the left all the way down the line, "Don Adams Special." That is the program, I take it?

THE WITNESS: Yes, sir.

THE COURT: Then it says, "Air date" and under that is the same date all the way through, February 26, 1970.

That is the date on which the music was used, I take it?

THE WITNESS: That is correct.

THE COURT: Then there is "Music Title," with a whole bunch of different songs. Then "Composer," and naturally there is quite a number of composers. Then "Publisher," and there are a variety of publishers.

Then there is a column with a letter L at the top of it and below that it says "A" in various places, "O" in various places, "P" in various places and "B."

Would you tell me what those letters mean?

THE WITNESS: Yes, sir. The L column is what we call the Licensor column.

THE COURT: So A means ASCAP, I take it?

THE WITNESS: Yes, sir.

THE COURT: B means BMI?

THE WITNESS: That is correct.

THE COURT: What do O and P mean?

THE WITNESS: O means Other and P is Public Domain.

THE COURT: Then the type of use is indicated on the right-hand side?

THE WITNESS: Yes, your Honor, it is.

THE COURT: All right. I understand that now.

The next page has The Anne Bancroft Special. It happens to be February 18.

Is each of these pages devoted to a particular program, so far as you know?

THE WITNESS: Yes, your Honor.

MR. BAKER: Could I just suggest that you turn to page 005?

THE COURT: Yes.

Q I will ask you the same questions. Is each page devoted to a separate program in a series?

THE COURT: I see here that at least for my benefit there are various dates. So it seems to be a running accounting of Carol Burnett's use of music throughout the year, I suppose. Is that correct?

THE WITNESS: During the 13-week peri[illegible] sur[illegible]

THE COURT: Yes. Even she couldn't sing [illegible] much music on one program.

Q Before going to Schedules B and C again, Mr Poklitar, let me ask you this: You have testified that the information in 835A was taken from the music log: I would ask you was there any alteration in the form of that information made in transferring it from the cue sheets or the reports into the computer system?

A With respect to background music, where all of that music was written by the same composer and publish[illegible] by the same publisher, we would list it in the survey as one performance.

Q Would you list it in the survey as one performance even though it appeared on two different programs or different programs in the same series?

A It would be one performance in that program in which it was used.

(Record read.)

Q Were there any other modifications other than the one you have related with respect to background music in the form of the information?

A We followed the same procedure with respect to themes. If there were more than one use of the theme and it was written by the same composer and published by the same publusher we would show it in the printout as one.

Q Directing your attention to Schedules B and C, are those prepared under your direction?

A Yes, they were.

Q Can you tell me how the numbers in Schedules B and C were arrived at?

A I furnished Miss Scott with information relating to the duration of each program and she went to the computer printout and extracted the numbers and made the computations which appear in the schedules.

THE COURT: She did both?

THE WITNESS: Yes, sir.

THE COURT: Did anybody check her arithmetic?

(Pause.)

Apparently nobody in this room did.

MR. HRUSKA: Possibly one person in this roc :

(Laughter.)

Q Mr. Poklitar, I would like to also show you Ex- hibit 1, Plaintiff's designation of documents to be produced in this action, copies of which have been pre viously supplied to counsel for ASCAP, BMI, and the C ur: I believe (handing).

Did you examine this description of the stud prior to its submission to counsel?

THE COURT: What description are you referri g to?

MR. BAKER: Exhibit 1.

THE COURT: You are talking of the whole of Ex- hibit 1?

MR. BAKER: Yes, sir.

A Yes, I did.

Q I would now like to ask you whether that is n accurate description of the time periods from which pr o- ming was taken, the duration of the program, and the de- tity of programs appearing during those time periods whi contain no music.

A It is.

MR. BAKER: At this time I would like to offer Schedules A, B and C in evidence.

I have no more questions of this witness.

MR. DAVIDSON: I would like to conduct a voir dire on the documents.

THE COURT: I am willing to wait until cross-examination is finished before I rule.

CROSS-EXAMINATION

BY MR. DAVIDSON:

Q Mr. Poklitar, there are two different kinds of music records used by CBS; cue sheets and logs?

A Yes.

Q And the logs are sometimes referred to as music reports?

A That is corred.

Q The cue sheets are used on films, programs, such as series and theatrical motion pictures; is that right?

A That is correct.

Q The music reports or logs are used with respect to live or live-on-tape programs?

A Yes.

Q Video tape programs?

A Yes.

Q Do you recall your deposition in this action

A I do.

Q I am going to read some questions and answers from the transcript and ask whether you remember being asked these questions and giving these answers:

Page 13, line 17:

"Q In the case of a motion picture which might be performed on CBS Television Network, what sorts of documents would be submitted to the performing rights organization?

"A We would submit a copy of the music cue sheet.

"Q Music cue sheet?

"A Yes.

"Q By whom is the motion picture cue sheet prepared?

"A The individual who prepares it?

"Q Yes.

"A I don't know the individual.

"Q Is it prepared by a CBS employee?

"A Which programs are you talking about?

"Q I am talking about a motion picture. A motion picture which had previously been performed in movie theatres.

"A In movie theatres?

"Q Yes.

"A And who prepared the music cue sheet?

"Q That's right.

"A I would think it would be somebody in the production company who produced the picture.

"Q Then your department obtains a copy of that document from the motion picture producer and forwards it to the music licensing organization?

"A Whoever lthe supplier of the motion picture is

"Q In other words, CBS would obtain the cue sheet from the firm which supplied the motion picture to CBS?

"A That would be correct.

"Q Does CBS check any of the information on the cue sheet for accuracy?

"A No, we simply forward copies to the licensing organization."

Do you remember being asked those questions and giving those answers?

A Yes.

Q Were they true then and are they true now?

A Yes."

Q Dropping down to line 17 on page 15:

"Q In the case of a filmed program on CBS Television Network, which was not produced by the network, what sorts of documents would CBS submit to the performing rights

organization?

"A The same sort of thing as we call the cue sheet would exist and we would obtain that cue sheet from the supplier of the program.

"Q Would the cue sheet for film programs be reviewed by your department for accuracy?

"A No."

Do you recall being asked those questions and giving those answers?

A I do.

Q Were they true then and are they true now?

A Yes.

Q Moving over to page 135, line 18:

"Q Mr. Poklitar, do you know where the persons who prepare cue sheets, which are sent to your section, get the information which is contained on the cue sheets

"A What cue sheets are you talking about?

"Q Let's take motion pictures first.

"A Motion pictures made for theatrical release originally?

"Q Yes.

"A I don't know where they get the information from.

"Q I ask the same questionwith respect to film programs.

A Television filmed programs?

"Q That's right.

"A Produced by other than CTN?

"Q Yes.

"A I don't know where they get the information

"Q Do you know of anyone at CBS who would know where the information which is on cue sheets for motion pictures films or television filmed programs is contained?

"A On programs other than produced by CTN?

"Q That is correct.

"A I don't know."

Do you recall being asked those questions and giving those answers?

A I do.

Q Were they true then and are they true now?

A Yes.

Q You were also asked some questions on your direction concerning music reports used on live programs starting at Page 32, Line 25.

"Q Mr. Poklitar, in the case of the live program does anyone in your department take any steps to verify accuracy of the information which is contained in the music report?

"A It is returned by the producer?

"Q Or prior to its being sent to the producer will limit it to after it is returned by the producer.

"A No.

"Q So that if the producer who concluded a composition which had not in fact been performed or has failed in fact to include a composition that was performed there is no procedure in your department followed which might point up such an instance, is that correct?

"A We rely on the information furnished by the producer."

Do you remember being asked those questions and giving those answers?

A I do.

Q Were they true then and are they true now?

A That's correct.

Q I am moving over to Page 49 --

THE COURT: If you are going to further question him along this line, I don't think it is necessary because if BMI intends to argue that because CBS didn't check the accuracy of the information it is not admissible, don't think I can rule in your favor. You may argue whether you can show it is not accurate or whether it deserves little weight and so on. It seems to me it is admissible first of all because it is a distillation and it is business records kept in the ordinary course of business.

Even if they are wrong, they are entitled to be admitted.

MR. DAVIDSON: It is our position they are not CBS business records. In case of cue sheets, they are the records of others.

THE COURT: Maybe I don't understand the situation. Correct me on this point. I am open to correction if I am wrong in what I am about to say. These figures taken from the cue sheets and logs are sent out to ASCAP and BMI, who act on the basis of them and send them back to CBS, and it seems to me that unless I can be shown in the past ASCAP and BMI have challenged the accuracy of these figures, an element of estoppel or some sort of

implicit ratification, the figures are adequate to explain what they purport to explain.

In any event I don't need the witness's testimony. If you wish to argue the point I will be glad to hear counsel on this.

MR. DAVIDSON: May I complete the record?

THE COURT: Yes.

Q Page 49 --

MR. HRUSKA: Couldn't counsel refer to it and put the page reference in?

THE COURT: Yes. There is no point in asking him the questions.

Q Mr. Poklitar, on occasion you have learned that the music report or cue sheet did not contain all of the music performed on the program, is that right?

THE COURT: Do you understand the question?

THE WITNESS: No, I don't.

(Record read.)

A There may have been some occasions like that.

THE COURT: It is not a question as to whether there may have been. Do you remember whether there ever was one?

A That we subsequently learned there was music not on the report?

THE COURT: Yes.

A In those cases we would have filed a supplementary report.

THE COURT: Did you ever find there was one which you didn't originally have all the information?

THE WITNESS: I believe so, yes, sir.

Q Mr. Poklitar, the study which is reflected on Schedule A, which is I believe PX835 for identification, that study was done twice, was it not?

A Yes.

Q The results were considerably different, were they not, in the two studies?

A I don't know that I can say they were considerably different. The total differs in some regards, yes.

MR. DAVIDSON: I would like to have this document marked as the next BMI Exhibit. I don't have the number.

MISS KEARSE: 163.

xxx (Documentmarked Exhibit BMI163 for identification.)

Q Mr. Poklitar, I show you PX163 for identification and ask you if you can identify it.

A Yes I can.

Q That is the first version of the study reflected in PX835?

A Yes. I would say so.

Q Did the same persons who performed the first study perform the second study as well?

A Yes.

Q Using the same methods?

A As to those dealing with background music there was editing done. There was editing done for the purpose of the second study which was not done in the first study and the reason for that is that the first study was set up with the understanding that the people who extracted the information would show the names of the composers and publishers and in each case where they were ASCAP or BMI. In examining the first study we found that there were occasions when this was not done so what we did in the second study was to explode the data to show the uses written by the individual composers and published by the individual publishers so that we ended up with differences in totals on the schedules.

Q The differences in totals were not limited to background music, were they?

A There was some changes with respect to feature uses and this was caused by an oversight by our programmer. There were keypunch cards made in the process of editing which

were sent to our data processing center and inadvertently he omitted to run those cards into the system.

Q Are there occasions when the spontaneous performance of music on the television network is unidentifiable, is that right?

A Yes, there are.

THE COURT: You can't tell what the composers are? Is that what you mean by unidentifiable?

MR. DAVIDSON: CTN could not tell what the composition was. There may be a difference. Maybe someone more expert could identify it.

THE COURT: There have been times when you could not tell what you heard?

THE WITNESS: That is correct.

MR. DAVIDSON: I have no further questions at this time.

MR. TOPKIS: May we have a couple of minutes?

(Pause.)

MR. TOPKIS: With your Honor's permission Mr. Gitter will cross-examine.

CROSS-EXAMINATION

BY MR. GITTER:

Q Mr. Poklitar, do you have Schedule A in front of you?

A Yes, I have.

Q You testified on direct examination I believe that the one change you madein the cue sheets in transposition of the information from the cue sheets onto the computer was to define performance as follows: That a background score was written by one composer and published by one publisher for a particular program all the background music of that program would count as one performance, is that right?

A I don't believe I said -- I answered as to a but I had in mind background cue. If there was more than one background cue written by the same composer and published by the same publisher we would show it as one performance.

d 2B

Q Turn to Page 0166. Just to be sure we ar
both looking at the same page, the sheet covering the
Hawaii Five-O?

A Yes, I have that sheet.

THE COURT: Wait until I find it. Yes,
have it.

Q Mr. Poklitar, would you look at the listing
for Hawaii Five-O under the date 1-11-72 background
THE COURT: Then I don't have that on Page
Is that for 1972 data input?

MR. GITTIER: It is 1972, your Honor, but
don't have any --

MR. HRUSKA: It is 166, your Honor, not 11

THE COURT: 166, excuse me.

Hawaii Five-O what?

MR. GITTIER: Under a date 1-11-72 backgro
music, Stevens-Short.

THE COURT: Right.

Q Mr. Poklitar, do you see that?

A Yes, I do.

Q Do I understand correctly, Mr. Poklitar, tha
Hawaii Five-O is a 60-minute show?

A Yes, it is.

Q Now even though there may have been 15 diff
t

background melodies on that show, all of those background melodies count as one performance in the study, isn't that right?

A Yes, I would say so.

Q Mr. Poklitar, Schedules A, B and C cover only prime time, is that right?

A That's correct.

Q Do you know how that programming was picked. Why you chose only prime time for this study, because you were told to?

A I guess all of our thinking today has been along the lines of prime time, night time usage. That is what we were --

Q Somebody told you to study only prime time, is that right?

A It was agreed, yes, to study prime time.

Q Mr. Poklitar, am I correct that the only music performed on the CBS Television Network for which your department does not get advance notice of the performance are the spontaneous uses of music you testified to on direct?

A By and large that is the case.

Q Can you think of anyother cases?

A Well, I can definitely recall some cases where a producer had used the song before, and he would add it to the music log having known that he used it before, he may not have told us in advance.

THE COURT: You mean he used it on a prior program or he used it previously on the same program?

THE WITNESS: On the same program, yes.

Q So except for such re-uses and except for the spontaneous uses you testified to on direct, your department gets advance notice of all music performed on the CBS Television Network, isn't that right?

A I would say yes.

Q Mr. Poklitar, your studies here set forth information in Schedules A, B and C those studies don't tell you, do they, how much of the background feature or theme music appearing on CBS programs are especially created for the programs, do they?

A No, they do not.

Q And you made no study of how much of the music used on CBS Television Network programs is specially created for the programs, did you?

MR. BAKER: Your Honor, I would like to object to any studies which have not been offered into

evidence, which were made at the direction of counsel as subject to the work-product provision.

THE COURT: Well, there may be a work-product privilege or there may not be if somebody is asked to produce something which you don't want produced, but I think it is not inappropriate for me to find out what you actually made.

MR. GITTER: All I am asking your Honor is for identification.

MR. HRUSKA: Your Honor, I think that pretty well discloses work product in a sense. There were in fact other things studied and some of them were studied for possible use on rebuttal case, and I think if the subject of what was studied were brought out from Mr. Poklitar, and obviously lawyers fashioned the study, we told Mr. Poklitar what to study, we told him what statistics to collect.

THE COURT: I assume so.

MR. HRUSKA: But the subject matter of what additional studies were brought out I think that would disclose a work product.

THE COURT: Would disclose --

MR. HRUSKA: Would disclose our work product. Would disclose our thinking as to possible areas of

rebuttal. THE

THE COURT: It seems to me that you reply to that broad a rule as to almost anything that has been talked over as a possibility and it would foreclose cross-examination on anything that the client had discussed with his lawyer.

MR. HRUSKA: Well, no, your Honor, I mean certainly Mr. Poklitar is open to cross-examination as to this study which we have been discussing on his direct examination. There are no bars on that, but in terms of did you study this other type of field, in the broad mail usage area, I think that would disclose our thinking, as to possible rebuttal case.

MR. GITTER: Your Honor, if I may make a brief comment, all I am asking the witness is whether he did or did not make such studies. I can't imagine how one is to make a determination whether a document or study is covered by work product provision without asking the question first.

THE COURT: I will allow the question.

THE WITNESS: Will you ask the question?

MR. GITTER: Can we have the question read back, maybe it will be shorter.

Q Mr. Poklitar, you made no studies of how much of the music you used on the CBS Television Network is especially created for programs on the CBS Television Network, did you?

MR. HRUSKA: Your Honor, that was not the question which Mr. Gitter had previously asked. He said was asking Mr. Poklitar whether or not other areas were studied. Now that, certainly, I have no objection to that question. I have in effect already answered.

THE COURT: Which question do you have no objection to?

MR. HRUSKA: To the question as to whether or not Mr. Poklitar studied music usage areas other than those disclosed in the exhibits that we have been discussing.

THE COURT: You may have no objection to that, but I don't agree with you that that was the question Mr. Poklitar previous was asked, but let's not bog down as to whether he did or not. My recollection is that Mr. Gitter asked the same question originally as he just asked again. That is the question we are dealing with. He is asking Mr. Poklitar whether or not a study was made by CBS as to how much of its music was self-manufactured. Right, was composed?

MR. GITTER: Manufactured for the particular

program on which it appeared.

THE COURT: R ight.

MR. GITTER: Created for the progr m on w . it appeared.

Q You made no such study, did you, Mr. Poklitar?

A We did some studies along that line, yes.

Perhaps I don't understand your original question. I'm sorry.

Q The question was --

THE COURT: Instead of saying "You did not do so and so," ask him, "Did you?"

Q Did you prepare a study of the percentage of music appearing on CBS Television Network that was especially created for the programs on which the music appeared?

A Yes, I believe we did, yes.

Q Did you prepare a study of the percentage of music appearing on the ASCAP repertory especially created for the CBS programs on which such music appeared?

A I think that was part of it. I really don't know whether -

MR. GITTER: Your Honor, I would like to ask for production of that study.

THE COURT: That one we will have to discuss further, I suppose, but all right, your request is noted.

Let's go ahead with Mr. Poklitar's questioning.

Q Mr. Poklitar, did the cue sheets and music logs that you used to obtain information for the computer run

here identify the music as feature, theme or background music?

A In the case of the music cue sheets for film programs, I believe they are so identified on the cue sheets.

Q But they are not so identified on the music logs prepared by your department, is that right?

A The film cue sheets.

Q The cue sheets with regard to the live and tape programs?

A The live programs?

Q Yes.

A No.

Q Who then made the determination as to what music was feature music, what music was theme music, and what music was background music for transposition on to the computer run from the jusic logs?

A We followed the definitions as made by ASCAP and BMI.

Q Who actually did that, Mr. Poklitar?

A The people who we assigned the task of tathering this data.

THE COURT: I don't understand how they did it. Even assuming you followed the definitions of

ASCAP, how did they go back to a log and determine that they should apply the definition A, B or C? How would they know by looking at the log?

THE WITNESS: We would show on the music log part of our description" ocal by Carol Burnett.

THE COURT: That would be presumably a feature?

THE WITNESS: That would be a feature use. would say Background, play-on, play-off, that would be background use.

THE COURT: So are you saying that even though the logs don't classify feature, theme or background as such, there is enough information on the logs so that you can apply the ASCAP definitions to the logs and determine whetheror not there was feature or background music use?

THE COURT: That is correct, your Honor.

Q What about logs prepared by your department in the first instance? They don't have that kind of information that was described to the Court, do they?

A I don't understand your question in the first instance.

Q You described to the Court the process of taking some information from a sheet prepared by somebody on the Carol Burnett Show. You say there is enough

information on that sheet to tell another worker, so s
body in your staff, whether it was a feature, theme or
background use; isn't that right?

A Well, let me go back a few steps.

The information that we received from the p c
ager contains the manner in which that composition i
be used. Based on that information, we then prepar
our music logs; showing the description furnished b
the packager.

Q And did your music logs in every instance con
tain information such as it is a play-on or play-off

A Yes, as supplied by the packager.

Q Let me show you a document that has been marke
BMI Exhibit 5 for identification.

MR. GITTER: May we mark a document for ide-
tification as AX 224?

THE COURT: Is that the one you just also call
BX 5?

MR. GITTER: BMI. It was an old BMI deposition
exhibit number.

xx (AX 224 marked for identification.)

Q Mr. Poklitar, let me show you this document
that has just been marked for identification and ask yo
if you can identify it.

A Yes, it appears to be a Xerox copy of one of our music logs. It has some writing on it which was not made by us as far as I can see.

Q Am I correct that this is a music log for a show called Lamp Unto My Feet, a Festival of Fantasy, Sunday, November 23, 1969?

A I would say so, yes.

Q Can you look at this document, Mr. Poklitar, under the heading Bongos and Sax Improvisations and could you please tell me how someone in your department would be able to take the information there appearing and determine whether that was a theme, feature or background music use?

MR. HRUSKA: Your Honor, this log does apply to something that is not on the study. It is a daytime show and it is 1969. It seems to me that--

THE COURT: You can bring that out on redirect.

MR. HRUSKA: I raise it as an objection only because it is beyond the scope of the direct.

THE COURT: Mr. Poklitar, is that exhibit that you are looking at, were there exhibits like that that were used in making up Schedule A and so on?

Q This is a music log of the kind you receive for night time programs, isn't that right, Mr. Poklitar?

A Not necessarily.

Q For some night time programs?

A I can't answer you.

THE COURT: What was the question that can't be answered?

MR. GITTER: Whether this is the kind of music log he receives for some night time programs.

A Well, if you are saying that we have some night time programs that have all these types of uses I can't answer it for all night time programs.

I can't recall that we have received that type of program.

Q This is the form you use for night time programs in your department, isn't it?

A As to making up the sheet, it is the form, yes.

Q Who would have prepared this particular form?

A Whichever staff member was assigned to that music for that show.

Q And your staff members prepare similar kinds of forms for night time programs, do they not?

A That is correct.

Q Do they not prepare those forms and put on those forms information of the kind that appears on this particular form, that is, AX 224 for identification?

A Yes.

Q And my quetion, sir, is, is there enough information on this form under the heading Bongos and Sax Improvisations for someone tomake a determination as to whether or not theperformaance there was a feature, them or background performance?

A Yes, I believe I have some information on the nature of the program, and as I recall, because we covered this in the deposition, it was photographing the party which took place in Boston, and at various times during that photographing there were people playing instruments and that were playing music, and they would have been on camera at the time they were playing.

Q And you know that because you saw the program isn't that right?

A I either saw the program or I base that on information that we had on the press release, if I remember I am not quite sure, but this was the supposition I made

Q So what enables you to make the determination whether the use here was feature, theme or background, was either seeing the press release or viewing the program isn't that right?

A Well, we have said in this program Vocal by one another listing is Instrumental Background, three additional listings are flute improvisations, Bongo and Sax improvisations and Bongo and Sax improvisations Instrumental for Belly Dancer,and closing under credits, so that I believe there is sufficient information there to make a determination as to whether it is feature or background use, yes.

Q Is there sufficient information on this sheet to make a determination whether Bongo and Sax improvisations was a feature, theme or background use?

A I would say by describing the program as being a party that these people were playing there and they were on camera --

Q And you knew that the program was a party becau

you hd either viewed the program or seen a press relea e isn't that right?

THE COURT: If you are suggesting that is not cricket --

MR. GITTER: Not at all, your Honor.

What I am suggesting is that the people who p e pred the classifications of the feature, theme or back ground music for the study neither saw the programs th m selves nor did they get any press releases.

THE COURT: I don't get much enlightenment fr m this, except at least in this one instance there is so e ambiguity, perhaps, which had to be remedied by outside knowledge.

But the real question is whether this is repre- sentative or it isn't representative.

MR. GITTER: I believe it is representative, you Honor.

THE COURT: You can't find that by questioning one instance.

May I see the exhibit?

MR. GITTER: I have no further questions, you Honor.

THE COURT: Anything else?

MR. BAKER: I just have a couple of que tions,

your Honor.

REDIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Poklitar, Mr. Davidson previously questioned you bout differences between the two Schedule A's and you used the term that you exploded some of the background music information from the first study to the second study.

Could you just describe what that process involves?

A Yes. We found that in some instances the people who prepared the data for the first study lumped together the use by more than one ASCAP or BMI composer and published by more than one BMI or ASCAP publisher.

What we did was to go back into the data and break out the information relating to each individual composer and/or publisher who were involved in the music for that program.

Q Mr. Poklitar, you also previously testified that the description which had been supplied to other counsel was an accurate description of the time periods and what not and so forth of the study and I believe that in answering Mr. Gitter's question, you used the term prime time and night time to refer to the time period of the study. Would you clarify that for us, please?

Was it prime time, was it night time, or is there a difference?

A It means the same for me. Night time is the

THE COURT: What hours?

THE WITNESS: In the study I believe, your Honor, it would have been after 7:30 or 8 o'clock, depending on the period.

Q Until what time?

A Until the end of the Merv Griffin Show in one year or the CBS Late Night Movie in 1972.

THE COURT: Thank you.

Are we finished?

MR. TOPKIS: I take it, your Honor, that Mr. Poklitar is going to endeavor to quantify some of the material that we were uncertain about before relating to spontaneous music performance.

I have no desire to bring him back. If my friends can supply me with a statement as to it, we would be glad to take a look at it and I am sure we could work out something.

MR. HRUSA: Yes.

I am afraid, your Honor, I was laboring under a misapprehension. I did not realize that with respect to the football and Conventions and parades there might

actually no records of what was sent prior to the broadcast by the band directors or music directors in other

THE COURT: That there was a method by which could be done.

MR. HRUSKA: That's right. I think we are prepared to undertake it.

THE COURT: All right.

MR. BAKER: There is still an offer of these documents in evidence.

THE COURT: Which three, the schedules?

MR. BAKER: The three schedules.

THE COURT: I will receive them together with or any of the other computer material that has been proposed here, so that any comments that other counsel wish to make with regard to computer material they can also make.

MR. DAVIDSON: Will you note our objection to the receipt of those documents, your Honor?

THE COURT: Yes, of course.

(PX 835, 836 and 837 received in evidence.)

THE COURT: It goes without saying that if you have any other information to produce on this subject, you are free to do it, whether it comes from CBS' file or anybody else's.

Thank you, Mr. Poklitar.

(Witness excused.)

MR. DAVIDSON: Your Honor, may I inquire whether CBS is also offering the underlying logs into evidence?

THE COURT: I don't think they are offering them. They are available, I suppose, if you decide that you want to use them.

I suppose they would be terribly voluminous and a burden to us all.

MR. BAKER: They have already been sent copies of the final logs. They have not received copies of the first notice.

We can look into that and see how voluminous they are.

THE COURT: Any request counsel wants to make first of all, I would like tolook into it and see how voluminous they are-- any request that counsel for defendants make for further information on this subject I will give fair consideration to. The door is not closed.

Do you want to make a request at this time?

MR. DAVIDSON: We would like to have access to those, your Honor, to the original copies of the logs returned to CBS by the producer.

MR. HRUSKA: Let me just state, your Honor, by

impression that these documents that Mr. Davidson has called for have already been sent in the ordinary course of business by CBS to BMI and they are in BMI's files.

MR. DAVIDSON: Your Honor, may I just state the procedure, as I understand it, CBS follows.

As to live programs and taped programs, the producer calls someone in Mr. Poklitar's department.

A member of Mr. Poklitar's department types of the songs which he has received from the producer.

He then sends a copy of that list to the producer.

After the program is aired the producer makes any deletions or additions which are required physically on the copy he receives, returns that copy to Mr. Poklitar's department.

Mr. Poklitar's department then retypes the additions and deletions onto another copy which is sent to the BMI.

Therefore, the copy that BMI receives does not have the information as to what was added or deleted.

THE COURT: It may have the information. You say it is not an identical copy?

MR. BAKER: Your Honor, that description is correct with respect to taped entertainment programs, but I have no idea whether it is correct with respect to footage

jhmg 8

games.

There are band directors of football games and not producers. All I can say is I will have to look at it and let you know.

THE COURT: I am not asking anybody to commit themselves to any particular position at the moment. I'm you find out what information is available and then le Mr. Davidson or Miss Kearse be prepared to tell me what they would like to look at and why.

All I am doing at the moment is saying I am accepting what CBS has offered at this time without pr to other people asking for other information if they have good reason for wanting it.

MR. HANSEN: Your Honor, at this time we would like to continue with the testimony of Professor Southwo

MR. HRUSKA: I just might say before we get started, your Honor, we obviously will not finish with th professor.

THE COURT: I understand.

MR. HRUSKA: Your Honor would prefer to have it now?

THE COURT: Professor, may I address myself you. In view of the fact that you clearly won't be able to finish your testimony this afternoon, since you will only be going for about 35 or 40 minutes, I'd be asked whether I preferred to start this afternoon or not. That is a decision I think you ought to make.

If you feel that continuity is essential to your presentation, and you would rather start the first thing tomorrow morning, although I regret your having to wait this afternoon, that is all right with me. If on the other hand, you would just like to get started now that you are here, that is all right with me.

THE WITNESS: I think that we can come to a reasonable stopping point in perhaps 20 to 30 minutes.

THE COURT: Let's plow ahead.

MR. HANSEN: At this time I would like to offer as an exhibit a two-page document which consists of the further qualifications of Professor Southworth.

THE COURT: All right.

xxx (GX 890 was received in evidence.)

R A Y M O N D W. S O U T H W O R T H resumed.

DIRECT EXAMINATION (continued)

BY MR HANSEN:

Q Professor Southworth, when you testified last week you demonstrated on the blackboard, as we can still see, how bits and bytes are arranged in parallel fraction on computer tape.

My first question today is would you please explain how they are physically recorded on the tape.

* * *

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January 22, 1974

CBS v. ASCAP, et al.

Dear Sirs:

Herewith is a list of corrections to the trial transcript in the above matter for May 23 and 24. These corrections have been agreed upon among all counsel. Further corrections will follow.

Please prepare an addenda sheet embodying these corrections and deliver copies of the same to the undersigned attorneys. Many thanks for your cooperation.

Date	Page	Line(s)	Error	Change to
May 23	1957	19	informationwould	information would
	1957	23	gut I	guts of what I
	1958	3	wating	wasting
	1958	12	informationor	information or
	1959	12	know	know.
	1960	20	MR. TOPKOS:	MR. TOPKIS:
	1961	10	record in	record it in
	1961	10	processing.	processing system.
	1961	14	easy	easily
	1961	15	easy	easily
	1962	23	Iknow	I know

Date	Page	Line(s)	Error	Change to
May 23	1965	21	AX 195	AX 196
	1966	8	191	197
	1967	2	AX 201	AX 200
	1967	15	gong	going
	1969	11	hhow	show
	1970	17	that	a portion of which
	1972	9	PX 1A	3M PX 1A
	1978	14	youydidn't	you didn't
	1981	5	NE	He
	1981	18	say	saw
	1983	19	tough	though
	1984	16	rule	ruling
	1985	4-5	credibilit y	credibility
	1985	9	repertoire e	repertoire
	1985	10	Repertoire	repertoire
	1985	21	pr ograms	programs
	1987	16	bu twith	but with
	1988	5	holding	Holding
	1988	6	company	Company
	1988	19	T he	The
	1989	2	agreeme nt	agreement
	1989	6	Allen	Alan
	1989	14	Ohrenstein	Orenstein
	1990	23	Vacco	Vocco

Date	Page	Line(s)	Error	Change to
May 23	1996	9	o for	for
	1998	15	using.	used.
	1999	7	tha t	that
	1999	7	unders tood	understood
	1999	9	regar d	regard
	1999	18	t ht	that
	1999	19	u ncertainty	uncertainty
	2001	22	Hi-ti	Hi-Ti
	2003	15	Star	Starr
	2003	25	Star.	Starr.
	2003	25	Star's	Starr's
	2004	2	Star	Starr
	2004	13	Star	Starr
	2004	21	Star	Starr
	2006	5	Star	Starr
	2006	8	Star's	Starr's
	2009	3	in mind	him on
	2009	13	Vice president	Vice President
	2009	23	Moveie	Movie
	2010	11	onour	on our
	2011	6	Juvenie	Juvenile
	2014	9	TelevisionNetwork	Television Network
	2018	10	choice?	choice.
	2020	10	wouldhave	would have

Date	Page	Line(s)	Error	Change to
May 23	2021	3	youare	you are
	2021	7	down	done
	2024	7, 8	cancelation	cancellation
	2024	14	They	A
	2024	15	guessowrk	guesswork
	2024	18	know he	know if he
	2024	18	may	may,
	2027	19	wouldhave	would have
	2030	10	T HE	THE
	2030	13	ABC's	ABC
	2030	19	hit, we	hit we
	2031	5	freque ntly	frequently
	2031	7	live	life
	2032	1	Segel-stein	Segelstein
	2033	22	Y ou	You
	2034	16	nothaving	not having
	2036	9	T HE	THE
	2036	13	on, they	on. They
	2036	14	what	all that
	2036	18	siagree	disagree
	2037	23	saidthat	said that
	2041	8	haveyou	have you
	2042	6	thir d	third
	2044	3	Emil Poklitar	Emil D. Poklitar

Date	Page	Line(s)	Error	Change to
May 23	2047	12	wil l	will
	2047	14	T HE	THE
	2049	3	had occasion	had on occasion
	2050	9	direct or	director
	2050	19	hve	have
	2050	21	frequenc y	frequency
	2050	25	nominarion	nomination
	2052	6	to you.	To You.
	2052	9	Ther	There
	2052	18	allthat	all that
	2054	22	Amnot	am not
	2060	6	wold	would
	2064	14	day-to-dayfiles	day-to-day files
	2064	22	lthe	the
	2065	4	886A	836
	2068	23	data	date
	2073	8	l,	1 to
	2074	17	corred	correct
	2076	9	lthe	the
	2076	21	Yes."	Yes.
	2077	24	questionwith	question with
	2079	13	concluded	included
	2080	17	u nderstand	understand
	2081	25	t he	the
	2082	19-20	identificatio n	identification

Date	Page	Line(s)	Error	Change to
May 23	2082	21	PX 163	BX 163
	2083	13	where	whether
	2085	4	madein	made in
	2086	12, 17	GITTLER	GITTER
	2087	25	anyother	any other
	2088	14	y our	your
	2090	2	THE	DELETE
	2090	3	that you reply to	that if you apply
	2090	5	and it	, it
	2091a	3	R ight	Right
	2092	15	on	in
	2093	18	jusic	music
	2093	22	tathering	gathering
	2100	2	hd	had
	2100	8	pred	pared
	2101	6	bout	about
	2104	17	tolook	to look
	2105	5	Ijust	I just
	2106	22	I'd be	I've been
	2107	2	essential	essentially
	2107	21	traction	tracks
	2108	9	t hat	that
	2109	11	an O	a zero
	2109	21	magnetis	magnetic

Date	Page	Line(s)	Error	Change to
May 23	2110	20	wriring	writing
	2111	13	ohow	how
	2114	7	read-write check	read/write head
	2116	3	ta;e	tape
	2118	7	Random access: several posits,	Random access: there are several possibilities,
	2118	17	repertoire	repertories
	2121	14	posits?	possibilities?
	2121	17	posit	possibility
	2121	25	whirling	querying
	2123	3	posit.	possibility.
	2126	4	imply	simply
	2127	11	tlaking	talking
	2129	13	then through	then someone through
	2130	14	done, but for what?	done for that.

MR. HRUSKA: I thought she said June 11th.

MR. GITTER: She said at least eight days.

THE COURT: All right, well in any event there is certainly no point in waiting to complete your case for that purpose.

Then am I correct regarding the plaintiff as having rested subject to the completion of Miss Preston's testimony and subject to offering the documents and exhibits that have not yet been offered?

MR. HRUSKA: And depositions, your Honor, and I suppose we ought to add subject to the various ground rules that we have established in the case regarding discovery matters.

THE COURT: I am not quite clear I understand what that is.

MR. HRUSKA: Well, we have ground rules which your Honor established on depositions, and also ground rules on document production.

THE COURT: Yes. I don't understand what further discovery is going to occur.

MR. HRUSKA: Well, only if the circumstances arise which trigger those ground rules would they become operative, but I think as a technical matter --

THE COURT: In other words, subject to the

ruling I have laid down so far?

MR. HRUSKA: Right, yes, your Honor.

THE COURT: As long as it is not something new.

MR. HRUSKA: Not something new.

THE COURT: All right.

MR. TOPKIS: Could we know what Mr. Hruska is talking about, your Honor? It seems to me that when a plaintiff rests, he rests.

THE COURT: He has rested, as I understand it, but you will recall that I had finally entered an order, or certainly wrote a letter if I didn't, on the question of the extent to which people would be permitted to put into the record material which appeared to be of significant value to the Court after the transcript had been completed.

I am not attempting to redictate that rule or reformulate it.

MR. TOPKIS: I understand.

THE COURT: I don't recall the details and I don't want to change it from what it was because it was quite a job to work it out, but Mr. Hruska was simply reminding me if I understand him now, and I would like an answer, that he was resting subject to whatever rights he has under that rule if it were invoked.

MR. HRUSKA: Right, your Honor.

MR. TOPKIS: All right.

MISS KEARSE: Could we also know, your Honor, if the depositions and documents that Mr. Hruska is referring to are those which have been designated during the days of this trial for introduction?

THE COURT: Mr. Hruska.

MR. HRUSKA: I am hesitating only because I have got a flash from the other end of the table that I better find out about.

I think that the answer to that question gets very, very technical, your Honor. I think the vast preponderance -- I hesitate to give any kind of percentage estimate -- of the materials that we will be offering, deposition materials and documentary materials, are the designated materials.

I hesitate to say finally that there are not some relatively small number of documents or line designations of depositions which have not been actually designated thus far. Now, one of the things -- I think one of the reasons that we put over this matter of documents and depositions, looking forward to the several weeks' break we will necessarily have in the case, was that we can get on with the other things in the trial and make sure we get all these loose

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ends nailed down.

There are no surprises involved here.

To the extent we have additional deposition lines or additional documents, they are not going to come as any great surprise, I think, to the defendants.

We are talking about materials we are all familiar with.

End 3A

THE COURT: I think I understand your statement. Let me give my reaction. I assume that your opponents quite understandably would like to know hook, line and sinker what you are going to offer.

I think that the plaintiffs and the defendants when the time comes of the obligation to specify precisely what they intend to offer. I have at all times indicated though, that as far as all parties are concerned, if it was discovered thereafter that although every designation intended had been in good faith made, there were minor additions which a party wished to insert into the record that would be useful to the Court, fair consideration would be given to those requests. I would rather leave it that way than to have you feel -- in other words, I think it's up to you and your colleagues now to make every effort to see that everything you want put in is put in, not at this moment obviously because you would simply have to waste time while you were examining the documents.

I think it should be possible foryou certainly by the end of the week. And I don't know to what extent, Mr. Topkis, your questioning of the witnesses will depend on the designation of such material, I hope it won't.

MR. TOPKIS: I wouldn't so claim, your Honor, not the witnesses we have slated for this week.

THE COURT: All right, then, in that case it may not be so vital but I think we should, before the day is out, set a deadline for the time by which the plaintiff must designate the material and equally for the defendants.

Now, you gentlemen and Miss Kearse, had indicated to me that you would like to argue on a motion to grant judgment for the defendants, and I would be glad to hear that. I suggest we take our usual ten-minute recess at this time.

MR. TOPKIS: Could I inquire, your Honor, would you like us to go first or Mr. Hruska?

THE COURT: I think the defendants would ordinarily go first.

(Recess)

MR. TOPKIS: If your Honor please, I will be, I think, relatively brief for a trial lawyer.

The basic subject to which I would address myself is the classical one at this time of what has the plaintiff proven. The lovely thing about a courtroom is that it's a kind of crucible where you get rid of the talk, you get rid of the pleadings, you get rid of the

verbiage and you get down to the question of what actual hard facts are we dealing with.

I think that that the most that can be said here is that we are dealing with is a fear, a fear on the part of CBS that if it tried direct licensing, it would encounter disinclination on the part of ASCAP members to deal with them directly; and this record makes it perfectly plain that if ever there was a fear which was not subjected to the test of reality, this is such a fear.

By the test of reality, I mean did they try it? Did they take so much as one step? Did they ask anyone? And the answer, we have asked every witness, did you try, the answer was no.

We asked every witness "Did you ever so much as talk to a songwriter?" The answer was no.

"Did you ever talk to a publisher?" The answer was no.

So when we say, what have they proven here, the most we can say, it seems to me, that CBS has put people on the witness stand, Sipes at any rate, who testified that he was afraid, and I asked him, your Honor will perhaps recall, I asked Mr. Sipes is there any other reason that you can think of why direct licensing wouldn't work except disinclination, and he said no. That was

his testimony. It could not have been clearer.

The difference -- well, let me put it this way -- a fear does not constitute a cause of action. The fear that somebody will boycott you does not constitute a cause of action for boycott; and so on the most basic level, it seems to me, CBS has failed to make out a case; because unless they can prove that we currently restrain trade the case must stop; and they haven't offered any proof on that point, with one exception which I will come to in a moment, the so-called 3M incident, which didn't involve them.

We are dealing here with the classical distinction the courts deal with all the time, the difference between fact and fantasy or fancy. When Joe comes into court and says "John hit me," Joe states a cause of action against John; but when Joe comes into court and says "I am afraid John is going to hit me," he doesn't; and that is the distinction we are dealing with here.

The courts are moved to act, to respond, only when there is reality, not fear. All of the evidence here, the evidence adduced on the plaintiff's case, is that if they did try direct licensing, it would work. Sipes said the only reason it wouldn't would

be disinclination and he had in mind, of course, that mechanisms are available, the Harry Fox Agency, Bernie BRody, Mary Williams, they all license sync rights all the time and the testimony was that with some expansion to account for the fact that today it's not necessary to license sync rights to all compositions, they could license performing rights directly.

I am not suggesting for a second that there wouldn't be a certain degree of perturbation and uncertainty in the indutray if CBS announced it was going into the direct license business. It would be a change, of course; there would be a period of shakedown but that is going to happen if you go to a per-use system, and to say that when there is change there is change is not to say that when there is change there is a cause of action, because there might be a little uncertainty there is a cause of action.

The 3M incident, that is the evidence that CBS has brought before this Court to suggest that there is reality to their fear.

THE COURT: I suppose you could say even if there is reality to the fear, that is still not a cause of action.

MR. TOPKIS: I could say that indeed.

THE COURT: You would go on to say that the fear is not real or at least that the 3M case does not prove it.

MR. TOPKIS: Exactly. What happened in 3M? They went to 30-odd ASCAP publishers and signed up 24, 25, 28 of them, and some refused, they couldn't reach agreement. Most of the time one guy was sick, Herman Starr. Another one said he'd rather stick with ASCAP. No doubt about that. One did. So? That certainly does not prove a mass disinclination even as to dealing with 3M back in 1964. What it does prove, the 3M incident, is that the vast bulk of ASCAP members with whom 3M tried to deal, dealt; and if anything, it proves that ASCAP members are inclined to respond, I feel when somebody comes in and offers them money.

We have heard here, I think, just two people realy talk about being disinclined or we have here evidence of two people being disinclined. First there was Miss Marion Mingle who testified that she would be disinclined to take a job with CBS. Remember, she said she was too old. I don't think that constitutes a cause of action either.

But if you want to look for the enterprise in this courtroom that is truly disinclined, I would suggest that this record reveals only one -- CBS. CBS is disinclined to try direct licensing, and why that constitutes a cause of action against ASCAP or my friends at BMI, I don't understand.

Now, we had, it is true, three producers who in at least harmony, if not precisely simultaneous language, testified, first, that if we went to direct licensing they wouldn't know what to do. Gee, they would have to call thousands and thousands of people. You could have cried your eyes out for them, until you asked them did they ever hear of Harry Fox and Bernie Brodsky, and then all of a sudden they realized that these awful fears were fantasies, they were nonsense. They too testified that the only barriers were disinclination, they are afraid.

Well, I don't know what to do about their fear. Psychiatry is not my line. But it is also not the business of any Court, so far as I am aware.

CBS has suggested that it couldn't go to direct licensing, that there is a barrier in the way of direct licensing, I take it because of AGAC's existance, the AGAC contract with some customers. We don't know

how many. We know AGAC does exist and it does have a contract which limits the right of a publisher to contract television use. We don't know to what degree. But we know also this, on CBS's own evidence: We know that although there was similar language which would have appeared to bar licensing 3M, most publishers went ahead and licensed 3M. And we know also that this is none of ASCAP's concern.. If AGAC and some publishers have a contract that constitutes an illegal restraint of trade -- I have no idea whether it does or doesn't -- that is not my problem, it is not ASCAP's concern.

There was testimony by Mr. Lane, Burton Lane of AGAC, that he did prefer to see negotiationss between 3M and ASCAP rather than negotiations directly between 3M and publishers, and he said his reason for it was very simple: He wasn't represented at the dealings between 3M and the publishers. All right, Mr. Burton Lane might prefer that ASCAP deal with 3M. But, Mr. Burton Lane did not say that he wouldn't be delighted to deal with CBS or anybody else. His testimony was if CBS came to him he would be delighted to talk.

What Mr. Burton Lane's problem was was that nobody came to him, and that he resented, and I think he

was entitled to.

Now, there was suggestion also from CBS that problems lay in the path of direct licensing in the form of commercials in the can and programs in the can. We could not have less quantified proof than we have on that subject. Let's see what we do have.

As to commercials in the can we had a witness who was as attractice as she was in error about her rights. You remember she had the idea that J. Walter Thompson had vested its rights in ASCAP. The fact, however -- and this cannot be contradicted -- is that every ASCAP member, J. Walter Thompson included, has an absolute right to license.

So for all of the commercials that are written specifically for J. Walter Thompson which J. Walter Thompson gets the copyright to, J. Walter Thompson has an absolute right to license the performance of those commercials on CTN or anyplace else.

She didn't know what proportion of the commercials she used contained music specially created for those commercials, what proportion was public domain, and so on. So the whole commercials in the can business is at best totally uncertain, and I think we come to putting in our proof we will be able to demonstrate that

it is a figment of the imagination totally.

THE COURT: Of course, we must remember Miss Preston's testimony remains to be completed, although she has completed her direct testimony.

MR. TOPKIS: Exactly so. Your Honor noticed who it was who insisted on bringing out the quantification of her testimony.

There is also the matter of programs in the can. There was testimony from Mr. Sipes that CBS has a vast inventory of programs in the can. But he didn't tell us and we haven't seen the contracts as to where the performing rights for the music in those programs lie.

So to what degree any of them contain music which isn't today available for performance on CTN we just don't know.

But there is a point even beyond that. This whole business of CBS being terrified that it will be held up by songwriters and song publishers because the songwriters and publihsers have CBS by the short hair because of the music in the can, that is nonsense, with all respect.

Hal Berman, a witness called by CBS, testified the same situation existe as to sync rights with a program

that has already been made and the publishers and the copyright proprietors routinely grant the rights. They don't try to hold anybody up.

Now, why is that? Mr. Berman gave us the explanation too. It's becauee they want to deal not only today, but tomorrow, and if you hold up somebody today, most particularly, if you hold up CBS today, your chances of dealing with CBS tomorrow are at best minimal.

So the whole idea that CBS has to quake with terror because of the material in the can is, I would submit, so much nonsense, again, so much fantasy, not real evidence at all. I think Mr. Berman's precise testimony was that publishers all know that we have to live together in this industry.

I finally come to this, your Honor: Mr. Sipes admitted on his testimony that this whole idea of a per use license is really an idea of a non-use license, because CBS would expect that all of its packagers would obtain music performance rights directly and the per use license just wouldn't operate, except in the most extraordinary circumstance, news programs and such, where music suddenly and spontaneously was interpolated.

That too creates grave doubts as to why it should be that 99 per cent direct licensing with one

per cent per use is great but 99 per cent direct licensing with one per cent either blipped out or arranged for by program or arranged for by very low blanket rate or something like that is so terrible.

And actually it's funny, the way the proof was offered to this Court is to out of keeping with reality of the world with which we are dealing here. Your Honor saw three producers on the witness stand, Suraga and Wright and Vincent, all of them producers of variety shows, and from the way they testified you would have gotten the impression the variety shows were the vast bulk of CBS programming. We know now that this year there were three hours of variety shows plus an occasional special per week and next year there are only going to be two, and there was some hope, some attempt at rehabilitating that sad situation by having Mr. Sagelstein testify that he foresaw a great jump in variety shows somewhere down the pike. Okay. I don't really believe that that is the way you save a record, by having somebody express a hope.

The real facts of this industry are, and indeed CBS programs are in evidnece, that nearly all of the programming on CTN is situation comedies, dramatic shows

game shows, daytime serials, and so on, for all of which the standard pattern is to use music created as theme and backgroundmusic for those shows, and there is no reason in the world why, when CTN's packagers and producers get the sync rights for those shows, they can't get performing rights, and if they don't get sync rights today they can surely get performing rights by calling the people they would call for sync rights, namely, Harry Fox, Bernie Brody, Mary Williams.

We are dealing here, your Honor, with fantasy and nothing more. We have been engaged for four weeks in a search for evidence. With all respect, we have seen none. And so I submit this case should end right here and you shouldn't go on with another three or four weeks.

Thank you.

THE COURT: Thank you, Mr. Topkis.

Miss Kearse.

MISS KEARSE: Your Honor, without duplicating Mr. Topkis's argument, in which I concur, there is just one point I would like to elaborate on, and that is that the disinclination that we have seen in this case is the disinclination of CBS to attempt to obtain direct licenses.

I simply want to point out to your Honor again that during the first six months of 1970 CBS was not licensed by BMI. The reason that CBS has advanced for not attemptingto get direct licenses is that CBS has had blanket licenses and that to attempt to get direct licenses would mean that CBS would be paying twice. But as of the time CBS started this lawsuit it was not licensed by BMI at all. So it had no reason for not attempting to get direct licenses during that period of time.

I think this underscores very well the fact that the disinclination in this case is the disinclination of CBS and not the disinclination of anyone else.

THE COURT: Thank you, Miss Kearse.

Mr. Hruska.

MR. HRUSKA: I think what these arguments point up, your Honor, is that we are dealing here very fundamentally with an issue of law, and I think it would be helpful to spend just a moment to put that in perspective.

We all know, and I won't dwell on it, that the case is governed by the Sherman Act, and we all know that the Sherman Act prohibits the monopolization of markets

and it prohibits combinations and conspiracies and agreements in restraing of trade, and what that means, cutting through 83 years of precedent, is that if there are two ways in which a market can function, one way which permits competition and another way that utterly eradicates it, then the way which permits competition must be preferred and it must be established, and it must be established in any suit brought by the government or by a private party withstanding, and that means, for example, a customer who is forced to buy from a combination of sellers which combination has arranged things in a way which forcloses competition, and that is so irrespective of any claim made by the combination that the absence of competition is good, it's good for the arts, it's good for the sciences, good for the widows, good for the orphans, good for the American flag.

All that is irrelevant, because the basic-social, economic, political, philosophical decision about what is good forthe public, competition or no competition, has already been made. It's been made by the Congress in theform of the Sherman Act, and the Sherman Act says, in effect, as interpreted through the years by the Supreme Court, competition is the rule, not no competition.

Now, in this case we are dealing with a market which is obviously not competitive. There is absolutely zero price competition that now goes on in the licensing of performance rights to television networks. And why is that so? Well, ASCAP offers -- and I will talk in this case about ASCAP; it's easier, and we have the stipulation with BMI -- ASCAP offers a blanket license on a take it or leave it basis and a blanket licensee cannot directly deal with ASCAP members without paying twice and there can't be any price competition without direct dealing. It's that simple.

Now, ASCAP defends this case, this non-competitive system, primarily on one ground. It says -- we just heard Mr. Topkis say it -- "Don't take our blanket license, don't pay twice, try getting along entirely on a direct dealing basis."

In other words, ASCAP offers an alternative to this non-competitive system. The alternative is the bypass.

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Now, there is no question in the law that if a combination of sellers seek to justify the existence of a non-competitive system on the ground that the customer has an alternative, and that alternative would put the customer at a handicap, at a competitive disadvantage, then that proffered alternative is not in reality an alternative at all.

It does not justify the continued existence of the non-competitive system, because the competitive disadvantage means that as a practical matter no one will take the alternative, and if no one takes the alternative that means that the non-competitive system will remain in effect.

Now, in the Associated Press case, which is a very important case, a combination of newspapers that ran the Associated Press, the AP, that combination argued that since there were other news agencies available to the newspapers who had been foreclosed from the AP Service, it was not a violation of the Sherman Act for this combination of newspapers to decline to sell the AP Service to their competitors.

In fact, the Supreme Court noted in passing that competing newspapers had gotten along without the AP Service.

But the Court rejected the AP argument on the ground that even though competing newspapers could get along without the AP Service, a newspaper without AP Service is "more than likely to be at a competitve disadvantage," and that the grounds proposed by the AP combination in justification, that is, that some alternative existed which would enable other newspapers to get along, would "fly in the face of the language of the Sherman Act" and "would make that law a dead letter."

Now, also as a matter of law and I believe common sense, if the alternative offered by the combination here had entailed, does entail a risk of competitive disadvantage so high that no reasonable manager of a television network would take it, then again it is not a real alternative, because no one, by definition, will take it, and if nobody takes it, the condition of non-competition will remain, and that I believe is basically the issue on this bypass question, on this bypass point.

But ASCAP says the customer here, CBS, has the burden of proving that the alternative entails a high risk, a competitive disadvantage, and that CBS cannot prove that unless it takes that alternative. In other words, unless CBS or until CBS attempts to bypass and injures itself in the process, CBS cannot maintain an injunctive

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action to recreate the condition of competition which this present system now precludes.

Now, that is not the law. The law does not require that a private antitrust party, private Attorney General, deliverately subject himself to injurious or I think in this case more realistically ruinous acts as a precondition to the maintenance of an antitrust action.

If it did it would mean that every time a cartel of sellers suggested an alternative to a buyer the buyer would have to try it and fail before he could sue, because the cartel would argue until the buyer tried it the competitive disadvantage or the risk of competitive disadvantage is speculative.

Now, you could envision a situation in which all the steel companies of the United States got together and fixed prices and a private party, a customer of those steel companies, brought a lawsuit, and the steel companies would say, "Well, this customer hasn't tried bargaining with the Japanese steel manufacturers. Maybe if he did that he wouldn't come out so badly. He ought to try it, because until he tries it the effect on this particular customer of the domestic price fix is speculative."

That is nonsense. That is not the law, can't

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possibly be the law.

In this situation we could envision ASCAP saying to CBS, "Try another alternative, try public domain music. Maybe you can get along with that. We won't know if you can get along with that until you try it."

Or ASCAP might take say only 50 per cent of its members' rights, rights to music, and say to CBS under those circumstances, "Try getting along with the other 50 per cent," and until we tried tht and failed we would have no lawsuit under ASCAP's theory.

That is not the law.

In this TV Signal against AT&T case, this recent Eighth Circuit decision which I previously mentioned -- by the way, the cite to that is 462 F. 2d 1256 -- the telephone company, which had an exclusive deal with the plaintiff's CATV competitor, said to the plaintiff, "Try using the electrical utility poles. In other words, you don't need all our AT&T poles. You don't have to strain our wires and/or poles. We have a deal with your competitor on that. Try using electrical utility poles. A lot of CATV companies use electrical utility poles and you might like it. Try it."

The Court in that case held that the use of

electrical utility poles, the use of this alternative which was proffered by the AT&T, was a defense and that the AT&T had the burden of proving that electrical utility poles would not cause the plaintiff a competitive disadvantage -- those are the words of the Court -- and certainly the plaintiff did not have to actually try electrical utility poles and then come back to the Court and say, "Now look, Judge, we have tried it, it hasn't worked, because we are suffering a competitive disadvantage."

You don't have to go through those steps to maintain an antitrust action.

The victim of an antitrust violation, the customer of a cartel, always has theoretically some alternative. For example, with enough time and enough money he can manufacture the product himself. But if all such alternatives had to be tried by such a plaintiff, why, we would write the injunctive provisions of the antitrust laws right off the books.

ASCAP says in its brief -- didn't mention it here -- that its theory is based on the Second Circuit decision in the American Manufacturers Mutual Insurance Company against ABC case. The plaintiff was better known, is better known, as the Kemper Insurance Group.

In that case the Court held that ABC could not be accused of tying, that is, of refusing to sell to the Kemper Insurance Group the right to place the Kemper commercials on less than all of the ABC network lineup of stations because Kemper had not really persued its request for less than all the stations and the context in which it had made the request indicated some question about the seriousness of that request.

I think that is a fair summary of the complicated fact situation.

To make a fact pattern of that nature even roughly comparable to this case we would have to change the facts in two key ways. First of all, we would have to have a situation in which ABC flatly refused to sell to Kemper anything but less than all the stations. That would make it comparable to ASCAP's refusal to grant CBS a per use license. And then we have to have a situation in which ABC said to Kemper, "You don't like our tying offer, deal directly with the stations, try that alternative, see if you can buy time directly from the stations."

Now, had that argument been made by ABC it would have been perfectly obvious that ABC would have the burden of proving that that alternative to its trying arrangement did not constitute a competitive disadvantage

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or high risk of competitive disadvantage, and certainly Kemper would not have actually had to try that before it could maintain an injunction action against this tying practice of ABC under my assumed set of facts.

In other words, your Honor, the undesirability of a bypass is not an element of our cause of action, in the same way that the undesirability of electrical utility wire arrangements was not an element of the TV Signal Company's cause of action. It is ASCAP's claim that such an alternative would afford the competition which ASCAP's blanket license only policy precludes, and we know more have to try that alternative, your Honor, to maintain this suit than we would have to try any other alternative that ASCAP could dream up.

Now, I have mentioned burden of proof in my discussion. I would like to pass that for a moment. I think it is clear that ASCAP has it, but I also think the evidence is so clear, given the legal standard we are dealing with, that it is going to end up not making that much difference who has the burden of proof.

That standard is if the alternative to a non-competitive market condition entails competitive disadvantage or a sufficiently high risk of competitive

disadvantage that no one as a practical matter will take that alternative then that alternative is not a justification, not an excuse for the non-competitive condition.

Now, what does the evidence show about that risk of competitive disadvantage? Well, we start off with something very, very striking indeed, and that is a stipulation between the parties. That stipulation has two paragraphs pertinent here to the point I am about to make.

Paragraph 13 of the stipulation says, in effect, that there is some portion --

THE COURT: I think it would be better, in view of the importance of the stipulation, if you actually read what it is you have in mind.

MR. HRUSKA: All right. Paragraph 13 -- and this is highly convoluted language that was the result of endless hours of negotiation -- "There is a portion of the performance rights to ASCAP music appearing on CTN programs as to which it would be relatively easy for CTN or producers of CTN programs to negotiate for licenses directly with the owners of the performance rights to said music.

There is a portion of the performance rights to ASCAP music appearing on CTN programs as to which it would be impracticable for CTN or such producers to negotiate

for licenses directly with the owners of the performance rights of said music."

Then there appears in brackets a reservation, which says, "Without limiting the party's rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability."

Paragraph 1b says, "If CTN chose not to have an ASCAP license, the producers of CTN programs did not obtain such licenses, and NBCTN and ABCTN had such licenses, in other words, black list, to the extent that CTN or the producers of CTN programs did not otherwise obtain the performance rights to the ASCAP music which they desire to use on CTN programming.

CTN would be at a competitive disadvantage vis-a-vis NBCTN and ABCTN.

What this means is, to the extent that CTN cannot obtain what in Paragraph 13 we call t he obtainable music, in effect, CTN would be at a competitive disadvantage.

There is some portion as to which it would be impracticable to obtain rights. That is Paragraph 13.

Paragraph 15 in effect says in a bypass, the failure to obtain that which is impracticable, would place CTN at a competitive disadvantage vis-a-vis NBC and ABC.

Now, on the eve of this trial, verily on the eve of this trial, ASCAP suddenly took the position that the unobtainable or inaccessible or impracticable portion of CTN's requirements was de minimis, and that the competitive disadvantage involved was inconsequential.

This is a letter from Mr. Topkis to myself.

I don't believe your Honor that parties stipulate, parties particularly in antitrust action, of this importan ce, execute a stipulation regarding de minimis amounts or inconsequential competitive disadvantages. I think that stipulation is clear on its face despite the convoluted language, I think the substance is quite clear, and that

in and of itself it requires a finding against ASCAP on the very issue on which ASCAP is principally defending this action.

ASCAP relies on the fact that Paragraph 13 reserves to both parties "The rights to adduce and offer proof regarding the reasons for such impracticability."

It does not however reserve to ASCAP the right to contend that there is no competitive disadvantage flowing from the impracticability or inaccessibility, whatever the reasons, and there is no reason for the impracticability which ASCAP can offer which would remove the legal significance of the fact of competitive disadvantage.

Let me get to those reasons and the problems with which CTN would be confronted in a bypass, because I think those reasons and those problems do nail this down.

THE COURT: Well, I don't mind your discussing that issue, but I would like you to begin to relate them to the legal questions to the actual testimony that we have had to date too.

MR. HRUSKA: I am just about to do that, your Honor, precisely because the problems that CTN would face in bypass, the problems about which we have had evidence in this case, are the foundation for the finding, even apart from this stipulation, as to the high risk that would

confront any manage of a television network in considering the bypass; and as I have said, your Honor, I believe that if that risk is so high that no reasonable manager would take it, then the alternative, the bypass alternative is more apparent than real.

Let me start with music in the can. This I believe is a very obvious and very significant problem. CBS, we have that testimony, CBS has upwards of $100 million of programs in the can, inventory. All those programs have recorded music and those programs are not usable unless performance rights can be obtained to that music.

Mr. Topkis suggests that all those copyright proprietors, all the people who own that music, are going to be very reasonable. They are not going to hold CBS up because they want to deal with CBS again. Well, the fact that wouldn't down here is that every one of those proprietors has artificial leverage, artificial in the sense that it is not attributable to the song. It is attributable to the fact that the song is in the can.

Now, a businessman looking at hard reality, he may hear from Mr. Berman who says our people are always quite reasonable whenever we catch you with music in the can.

But how likely is that to happen in today's

world? When a businessman looks at this on a massive scale, 100 million or more dollars worth of inventory, tied up with this problem of artificial leverage, I don't believe that a businessman in his right mind is going to willingly confront that problem, and this ties in with the risk.

ASCAP has suggested we might cure that problem. It is kind of a strange proposal. What it amounts to is we start out, Day 1, we have $100,000,000 worth of inventory, and we get a blanket license for a period of years, and during that period of years we kind of work out that inventory: that is all covered by the blanket license but we directly license everything else, so that at the end of the period we get out from under and what about the fact that we have directly licensed at the same time that we had a blanket license and we are paying twice?

Well, that's easy, he says, ASCAP will just go to the consent decree court and say, "Just give us a reduction, we just spent ten million dollars, or whatever it is, over the last five years, buying performance rights, deduct it retroactively from the blanket license fee."

Now, first of all, in dealing with a publisher I think that is going to be kind of a funny transaction to approach the publisher and say, "We'd like a direct

license to Up A Lazy River, and the publisher says, "Well, don't you have an ASCAP license?"

And we said, "Yes, we have an ASCAP license, but you see we want to bypass ASCAP, we want to bypass your licensing organization, so we want to, even though it involves paying twice, why don't you sell us a license to that music?"

He is going to think we are crazy. That transaction is going to be so curious and strange that it is not the kind of transaction I think inthe first place that businessmen are ordinarily prone to go into; but even assuming that you can make deals like that -- and I should point out here that if that publishers gives you a license, direct license, he doesn't get the ASCAP distribution. Even though the song is covered by the ASCAP license blanket license, that publisher if he grants a direct license, doesn't get distributions, and that's going to affect that transaction.

But even assuming you can make transactions like this you still have to go to the consent decree court and run the risk that maybe, just maybe, you won't get a retroactive reduction between the consent decree doesn't say anything about licenses like this or retroactive reductions and we have in the Shenandoah case, in the second

Circuit a very strong holding to the effect that if that consent decree doesn't expressly provide for a particular type of license, then the user has no right to that license under the consent decree.

His full remedy is the antitrust laws, but under the consent decree, he is bound by the metes and bounds, the express language of that decree.

Does a customer really have to go through this kind of silliness to reach a competitive market and solve his music in the can problem? Particularly when it is so obvious that it is not going to solve the problem, particularly when it is so obvious that no rational businessman is going to gamble on a consent decree court giving him a reduction which the consent decree doesn't provide for and even if it did you wouldn't know what the amount of the reduction would be.

Now, commercials in the can. Another very, very bad problem. There is no question but that there is some portion of the music recorded on pre-existing commercials to which the advertising agencies do not own the right to make that network performances.

We have heard from Miss Preston on that point, and --

THE COURT: Mr. Hruska, assuming that is so, wouldn't the problem be almost identical there to music in the can?

MR. HRUSKA: Well, it is certainly closely aligned. The additional feature is this, your Honor: Commercials are really the life blood of the television network business, and when a manager of a television network confronts the prospect that the advertising agencies are going to have big problems in getting their commercials on his network, that is not an irrational fear.

THE COURT: I understand the significance of the subject, but that is different from what proof we have about it or what --

MR. HRUSKA: All right, I agree with your Honor there is no point debating what Miss Preston said or what the J. Walter Thompson contract provides for. It is going to speak for itself and I think it makes it crystal clear that the writer has a veto right on any licensing of that commercial other than through ASCAP, but the language of the agreement will speak for itself.

THE COURT: That is true even where J. Walter Thompson, whatever the subsidiary's name is, the owner of the copyright?

MR. HRUSKA: Absolutely, that is what this form

of agreement making J. W.T. the "owner" says because it is subject to having the music licensed through ASCAP. That is what it says in words.

Once the music is not licensed through ASCAP, then the publisher J.W.T. Publishing Company cannot license without the writer's consent.

THE COURT: As you both say, the contract controls on that.

MR. HRUSKA: Yes. I think Mr. Brettler's testimony on this point is very interesting too. He said that it wouldn't be correct in dealing with an advertising agency on published music, it wouldn't be correct, he said, to collect twice. It would be a double payment and it would be very unethical on our part. He said, "We might find a sleeping advertising agency that doesn't know the rules of the game and we might sock it to them. We just wouldn't do it to a customer. Under the structure in which we operate it would be highly unethical. There is no reason to charge an advertising agency a performing fee for what he can do the minute he sells that jingle and it is accepted over the air.

THE COURT: I am not quite sure why you bring that to my attention.

MR. HRUSKA: Simply because it shows your Honor that it is so implausible that an advertising agency would actually buy, pay additional amounts of money for the right to use published music in a commercial -- such as Up, Up and Away.

THE COURT: I may believe thatthat is true, but I don't know that Mr. Brettler's testimony says that or simply says he wouldn't charge twice.

MR. HRUSKA: He actually said that he did not charge twice; and that this is an explanation of his reasons.

Now I think these two problems in and of themselves, commercials in the can and -- perhaps in the can are dispositive even without the stipulation-- are dispositive of this bypass issue, of the fact that this alternative of a bypass entails a risk so high that no manager of a television network would take it.

Now we come to the points of lack of machinery and disinclination and I'd like to treat them together because to a very large extent they go together.

On the lack of machinery, again we have a stipulation which says in paragraph 16, I think it is, "Very few individual broadcasters have ever requested performance rights licenses directly from individual ASCAP members. It shall be deemed" - and this is the important part of it -- "It shall be deemed that ASCAP members have not established facilities or procedures for processing such requests."

This again is an obvious point and that is

why we stipulated to it. Why inthe world would music publishing companies create facilities for even processing users' requests for direct licenses? No user asks for direct licenses. ASCAP has always handled that. That is in effect the publishers' facilities; machinery, ASCAP.

I think it is also clear that if any television network were to attempt a bypass and there were no machinery, that every time a producer of a television program wanted a direct license he'd have to call out of the blue, find someone to call and call out of the blue to a publisher who wasnot set up, pre-conditioned to deal directly; that that would be an unanswerable problem for a good long period of time. WE don't have much time here. That is another point I will come to later; and we are not talking about two variety programs, not even two measly variety programs as Mr. Topkis referred to it the other day.

We are obviously now at a low ebb on musical variety programs. We got testimony from Mr. Sipos and Mr. Siegelstein that that will almost inevitaably go up, the networks are actively seeking more material, more performers to sustain musical variety programs, and it stands to reason they would.

THE COURT: Well, I am not sure whether I think the quantity of music thatyou want to use is terribly important anyway. It seems to me that you are either entitled to buy music on one basis or another basis, you are eight right about the fact that the pre-arrangement is illegal or you are not right about it.

MR. HRUSKA: There is one striking factor, your Honor, and that is that ASCAP gave us a list of the top 14 publisher groups and the credits generated by those groups in total and on CTN; and it turns out -- these are the old line publishing companies, Warner Brothers, Chappell, Morris -- in fact all the publishers who did not deal with 3M and some others besides -- and those top 14 groups alone generate 45 per cent of the total ASCAP credits on CTN; so in terms of publisher music, that is a very, very big shrug.

Obviously music, published music is being used on programs other than those nowthree next season. two variety programs. Last year,I think it was,we had more than 70 specials, all of which used music. In fact, there were I think about --

THE COURT: Mr. Hruska, I am going to ask you to condensce the remainder of your remarks. You have -- I didn't want to cut anybody off but you have taken a

good deal longer than everybody else getting close to lunch hour and I would like you to wrap it up with regard to what you believe that you have proven since we stepped into the courtroom; in the light of your legal framework which I agree with you is important.

MR. HRUSKA: I think we have established this: I certainly think we have established that a bypass attempt by a television network would be an utterly irresponsible act; that it would --

THE COURT: You mean irresponsible to its stockholders?

MR. HRUSKA: Irresponsible to the stockholders, that is right. When you are dealing with a television network, it's so much easier to lose audience than to recoup it; where you cannot sustain this sort of injury for any appreciable period of time, when the people you are dealing with know you can't sustain it for any appreciable period of time, know you are on the ropes; I think the evidence that we put together here establishes so clearly that CTN in fact would be injured, but it certainly meets the standard of a high risk of competitive injury or handicap.

We have collected here in the depositions an extraordinary, absolutely extraordinary series of

admissions from publishers about their attitudes concerning direct licensing in general and a bypass by CBS in particular,"self annihilation," says Mr. Brettler; "the end of the road for me as a publisher," says Mr. Morris. "I will take you off the list," says Mr. Vogel. And Mr. Vogel, who was ridiculed by ASCAP, Mr. Vogel has one of the strongest catalogs in ASCAP. As a single man not a publisher group he is almostalways in the top 50 ASCAP list of publisher distributions.

THE COURT: I get your point on that. You want to go on?

MR. HRUSKA: All right. Now the significant thing on the 3M incident, I must mention that, your Honor, that incident is significant really because of the immense difference between what 3M was doing and what ASCAP is suggesting to CBS that it do.

We had in the 3M incident 3M going off finite limited number of compositions, 700 of them. 3M had almost six months to do that. They started it October 21, 1964 and they had until April, and they had to know byApril because they wanted to record in June. They had a good deal of time.

Also this was a brand new source of income for the publishers that they approached. It wasn't taking

anything away from those publishers and they knew if they dealt the project would go ahead and they would have no income and it was significant if they didn't deal it wouldn't go ahead so they'd lose it.

And there was no real risk to the system. This was not a situation where they really ought to have concerned about a domino effect.

THE COURT: I take it that you contend that the testimony about the 3M incident here proved that even if there were all those -- that the taking into consideration that there were all those benefits for the publishers, that evenif were all those benefits and all those factors which would be according to you any way easier and smoother than what ASCAP and CBS should do, that even if all those things were taken into consideration and there still was resistance then it is reasonable tobelieve that there would be substantially more resistance if you tried it.

MR. HRUSKA: Grains of sand compared to the watermelons as Mr. Brettler said. Andwe introduced this not simplyto show the pattern of rejections and acceptances, although it's significant that nine and the biggest nine turned this down, but to show the pattern of thought processes. Everyone of those publishers

approached, with very limited exceptions, expressed -- some concern connected with ASCAP. The reasons were no matter what else they said there were reasons tied into ASCAP. The publishers who didn't say that simply said they would not entertain the deal, and this Warner Brothers thing, why in the world does the business of Warner Brothers have to come to a crashing halt because Herman Starr is not feeling well. I mean for a big company like Warner Brothers to turn down a deal like this which probably would have generated a half a million dollars for Warner Brothers, because Herman Starr was in the hospital, is a very odd reason.

Now, Victor Blau --

THE COURT: I understand the general outlines of it and I don't think you need to argue at this point the details of each item of testimony.

MR. HRUSKA: All right. Then what we come to is the question of market functioning. I don't know whether the point has been abandoned by ASCAP but at one point in this case at least we thought we had a contention that this market would not function under a per use system. Of course, that argument would be inconsistent with the idea that the market would funtion from CBS in a bypass. Perhaps that is why we haven't heard

a great deal about that. I don't think there is any real question about the fact that the market would function in a per use system because I think with a court holding which is a necessary predicate for the establishment of a per use system, and the self generating machinery which the witnesses have talked about, it would work. That is one of the many reasons we did call these producers and one of the main reasons we called them from variety programs because they also did other things and they testified about that, because if they could work under this system, if they had no qualms about it, then it should work, that is absent a saboutage. If there were saboutage, that is, if members would pull their music out of a per use license and then make themselves inaccessible, that I think is going to be detected. It's a risk your Honor knows we are going to run that risk because we put the letter in at an early stage in this case but I think it's a manageable risk. We are prepared to run it; and obviously if it were detected, we would have to take some recourse about that.

The only other part of the case I think may be worth mentioning now is this per program idea. I think the per program license is obviously and inherently more restrictive alternative than a per use license; also

it requires attempting to bypass ASCAP a program at a time rather than a song or use at a time. There is no justification for those restrictions. It's no more difficult to administer a per program license than it is to administer aper use license. In fact, it's even more difficult because in a per program license ASCAP would have to end up auditing the finances with respect to each program and that can be a very, very messy business.

The one last point I want to mention, your Honor, is this: At a relatively early stage in this case ASCAP was maintaining the test here is whether or not the per use system constitutes a less restrictive system, that is less restrictive on competition of the precise testimony. That seemingly is now abandoned. ASCAP is offering a test which is called the reasonable accommodation of interest test; I would say on that, your Honor, the Sherman Act does not talk about reasonable accommodation of interest. It talks about competition, that is the goal, that is the standard, it's the test in this case and I think we have met it.

THE COURT: I thiank you, Mr. Hruska.

Gentlemen, Miss Kearse, it seems to me that as long as we are so close to lunch hour it would be foolish to start a new witness at this time. We will

break and resume at 2 o'clock.

(Luncheon recess)

AFTERNOON SESSION
2:20 p.m.

MR. TOPKIS: If your Honor please, before we begin, my attention has been called to the fact that your Honor had deferred ruling on the 3M contracts with various ASCAP publishers that we had offered. They were designated as AX193 to AX223. Your Honor will recall you deferred ruling on their admissiblity pending advice from Mr. Hruska as to his position.

MR. HRUSKA: Mr. Baker will handle that.

MR. BAKER: Your Honor, with the benefit of the transcript, I tried to review those documents overthe weekend and there is some confusion as to which documents, at least in my mind, they intend to offer.

For example, AX201, which the record indicates is the same as Plaintiff's Exhibit 584, is an agreement on the M2100 machine, which has nothing to do with the M700.

Now, it is conceivable that the transcript is unclear, but what I would propose as the easiest way to do it is simply for them to give us a copy of each document they propose to introduce with the number on it.

THE COURT: Let me ask you this: DOes CBS raise any objection -- I don't mean do theylike the idea -- do they raise any legal objection to the admission of all 3M contracts that are offered relating to the M700 project?

MR. BAKER: No, sir, not as long as those contracts are both complete and signed.

THE COURT: Are you offering anything else?

MR. TOPKIS: I don't think so.

MR. BAKER: My problem is, I can't reveal them until I am absolutely certain which ones they are.

MR. TOPKIS: Why don't we go outside of the courtroom time and maybe Mr. Baker and I can do it.

THE COURT: Yes, I will ask you to do that, but I will make a ruling at the present time, that all exhibits offered in the number group indicated by ASCAP which are 3M contracts relating to the M700 project, which are complete and are signed, are designated exhibits.

MR. TOPKIS: With that, your Honor, ASCAP will call as its first witness Mr. Paul Marks.

P A U L M A R K S called as a witness by the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Marks, where are you currently employed?

A I am employed at ASCAP as its director of operations.

Q Do you have a college degree, sir, from NYU, I believe?

A That's correct. I graduated in 1951.

Q You went to law school subsequently?

A That's right. Graduated from Yale Law School in 1954. Subsequently, prior to becoming a member of the bar, worked in apprenticeship program in the U.S. Attorney's office.

Q Here in the Southern District?

A In the Southern District. Went into the United States Air Force in 1954 until 1956, clerked for J. Alexander Bicks here in the Southern District till some time in 1957, and was then employed in the ASCAP legal department.

Q For how long were you in the legal department?

A About a year. Some time in 1958 I moved from the legal department to become the assistant to the head of the distribution area, then Mr. Richard Murray.

Q What did you do then, remained Mr. Murray's assistant for how long?

A Remained Mr. Murray's assistant until he became ill. Some time in 1961, I became the distribution manager of the Society.

Q In this capacity your job was supervising the distribution among ASCAP members of the sums to be distributed?

A That's correct.

Q Calculation as well of the sums to be distributed?

A That's correct , the -- everything having to do with the determining how much of the distrib ution should go to which members and how that should phycially get to them.

Q For how long did you remain distribution manager?

A Until I became director of operations in 1969.

Q Well, I think we will fit you in as director of operations in a few minutes. I would first like to ask you a few general questions about ASCAP.

MR. TOPKIS: I may say, your Honor, that the most careful study of documents in the record will reveal what I am going to ask Mr. Marks to testify to, but unless you spend years studying those documents I think it is easier to get it from someone like Mr. Marks.

THE COURT: All right.

Q Mr. Marks, in general terms, who is eligible for membership in ASCAP?

A Well, any writer or -- who has had at least one of his works either publishers or commercially recorded would be eligible for writer membership in the Society.

We also have an associate member --writer membership at this time, and there a member need not have

a work of his recorded or published. If he has written a work, he goes to the trouble of copyrighting, he may be eligible for associate membership.

THE COURT: What about self-publication?

THE WITNESS: Pardon me, sir.

THE COURT: What if you publish it yourself, does that make you an associate member?

THE WITNESS: No, in order to meet the requirement of publication it would be regularly published by a commercial organization, but there is no problem, your Honor, that arises there. Not only do we have these self-publications but we have the song shark phenomenon in the industry where people will prey on amateur writers by offering to publish their work for a fee.

So that that also is not a -- that type of publication would not allow one to become a member.

THE COURT: I see.

A On the publisher side, anyone regularly engaged in the business. He need not be actively printing compositions but if he represents the rights, the performing rights in a composition that has been commercial recorded or published, commercially regularly published, he would be eligible for membership.

Q Do ASCAP publishing members fall into any

particular category or do they run the whole gamut of publishers?

A Well, we have all sort of publishers. If you are familiar with the business you know that there are some publishers who are quite large, others who are quite small, and a great many who run in between, some who represent a catalog made up of a great many different writers, others that may represent a catalog with only one writer, maybe a writer-performer who has his own publishing setup. It may be a publishing company that is associated with a record company. It may be associated with some other company, maybe associated with a motion picture company.

There are many different kinds of publisher members in the Society.

Q So too do they run the range of types of compositions or anything from the most serious to the most popular Country, Western, Rock n Roll, or whatever?

A The catalog has within it certainly every kind of music that one can imagine. There are many different kinds. You mentioned serious and popular, of course within each of those areas you have got different kinds of music. The symphonic catalog may be classed as serious. You may also be talking about Gospel and Religious music, jazz, music written for the Broadway stage, music written for motion

pictures, pop, Country music, within that, Rock music, Folk-Rock, Country and Western, Soul, so that the kinds of music really are as many as the kinds of tastes in music that we have.

Q There was testimony here, Mr. Marks, that J. Walter Thompson, the advertising agency, has a subsidiary, JWT,Inc., which belongs to ASCAP. Are there any other advertising agencies which to your knowledge which through subsidiaries hold membership in ASCAP?

A Not that I know of. I just don't know of any other. They have not come to my attention.

Q You would expect that if there were such, it would come to your attention?

A I would expect so.

MR. HRUSKA: I object, your Honor, to that.

THE COURT: To what?

MR. HRUSKA: To that last question. I think a foundation ought to be laid before the witness is permitted to answer it. Why would he expect that?

THE COURT: Overruled. He only said he expected it. It's not a foolproof assertion.

Q Mr. Marks, how does one actually become a member of ASCAP? Do you apply or what?

A Yes, one if he is interested in let's say becoming a writer or if he is a writer of music would make application. We have got membership offices in New York, in Hollywood, in Nashville. There are also other

branch offices which don't specialize in music, in 14 locations around the country; but anyone interested in becoming a member can apply at any of these locations, get an application, make application, if he is eligible, meets these elibility requirements that I mentioned, which is having a single commercial recording or regularly published work.

He would then be elected. It goes to the board of directors once a month, and it's really a pro forma matter.

Q Once the criteria are satisfied?

A That is correct.

Q Is there a parallel procedure for publisher members?

A That is correct.

Q Are there dues charged by the society?

A Yes, there are. The writer members pay dues in the amount of $10 a year, and publisher members in the amount of $50 a year.

Q How many publisher members does the society have right now?

A Inthe neighborhood of about 5000.

Q Constantly changing, I gather.

THE COURT: That is publisher?

THE WITNESS: That is publisher, your Honor. It's a growing figure, yes. There are elections each month.

Q How about writer members?

A In the neighborhood of about 15,000.

MR. TOPKIS: Your Honor, we have marked as AX234 for identification the latest printed list of members of the society, and in the interest of having the record complete, I would offer it. Mr. Marks so identified it.

THE WITNESS: That is correct.

MR. HRUSKA: I have no objection to this document going into evidence, your Honor, but I would like to point out that we have not received from ASCAP any notice about any documents that they plan to offer. As I say, I know this document. I have no objection to it. But there may be occasion if other documents are offered today where that might be proper.

MR. TOPKIS: If there are any surprises I am sure we can work that out but these are formal documents.

THE COURT: This document is received, and we will observe that ASCAP is bound by my rulings as to prior notice the same as anybody else.

MR. TOPKIS: Yes.

(Exhibit AX23 for identification was received in evidence)

MR. HRUSKA: I might also add to that, your Honor, we have not gotten any notice either of the substance or the subjects that Mr. Marks is going to be covering today. Again I don't know if that is a problem, but I think the record ought to reflect that.

MR. TOPKIS: And agin in the interest of a full record, your Honor, I can't say it makes too much difference but I have here a copy of a biographical dictionary published by the society of which of course -- or friends of a copy since they belong to ASCAP; which I think might furnish casual reading if not for your Honor for your law clerk possibly. I'm constantly flabbergasted to find out who belongs to ASCAP. My latest discovery was Louis Nizer.

MR. HRUSKA: Is he a member?

MR.TOPKIS: He is indeed. I think he has written songs named after every one of his grandchildren. I will offer it as AX235 for identification the biographical identification.

(Exhibit AX235 was marked for identification)

MR.HRUSKA: I have some hesitancy about thsi document, your Honor. I guess that from time to time I flip through it, and I have seen some pages in it but I don't know what else is in there. Perhaps we could.

THE COURT: I will reserve decision. You will look over and see if there is anything.

MR. HRUSKA: Couldwe ask what the purpose of that offer is?

MR. TOPKIS: Just to give an idea of the diversification of our membership and their compositions, your Honor.

MR. HRUSKA: May I ask counsel whether he is limiting the offer to simply the biographical data?

THE COURT: What else is in it?

MR. HRUSKA: I don't know.

MR. TOPKIS: I don't, either.

THE COURT: Why don't you look it over?

MR. HRUSKA: I think there are some other --

MR. TOPKIS: If there is a plague on CBS lying in it I will withdraw it.

THE COURT: Not now but let me know if there is any objection.

MR. HRUSKA: There is a foreword and a preface which I imagine makes some self complimentary statements but if the offer is limited to the biographical material.

THE COURT: All right, then I will receive it for the biographical material. Received in evidence as indicated.

(Exhibit AX234 was marked for identification)

Q AX 234, Mr. Marks, this list that you identified a moment ago, lists on its front a number of what appear to be performing rights societies in foreign countries. Is that a list of performing rights societies in foreign countries with which ASCAP has contractual relations of one kind or another?

A Yes, it is.

Q Let's come, Mr. Marks, to the formal organization of ASCAP. As I understand it, the society has a board of directors of 24.

A That is correct. 12 writer memebers elected by the membership.

THE COURT: Elected by the whole membership or each group elects its own?

THE WITNESS: The writer members elect the

writer members of the board and the publisher members of the society elect the publisher members of the board. At least three of the writers and three of the publishers as the case may be.

Q What does that term "standard or serious" mean?

A Well, it means that they are either writers or publishers of music that we would think of as in the classical strain, serious music; let me give you an indication by the writer members of the board in that category are Samuel Barber, Vincent Persichetti, Morton Gould. The publisher members of the board in that category are Boosey & Hawkes, Theodore Presser and Shawnee Press.

Q Those are three publishers specializing in serious music?

A Serious music, right.

Q Incidentally, Mr. Marks, going back to members for a second, do I understand that membership in ASCAP carries with it the right to receive some kind of certificate of membership?

A Members do receive a certificate of membership. They receive a membership pin, some of whom wear them, some of whom I am sure lose them as soon as they get them.

Q No cufflinks?

A There are ASCAP cufflinks, but they ar not sent to mamebers.

Q ASCAP's chief executive officer is its president, is that correct?

A That's correct.

Q How is the president chosen?

A The president is customarily a writer member of the society. He is elected to the board of directors as a writer member of the board of directors. The board of directors in turn elects from among its writer members one of them to be the president.

THE COURT: Is the fact that he's a writer

a matter of a custom or a matter of a requirement of the bylaws?

THE WITNESS: I believe it's a matter of custom, your Honor.

Q There has never been a time, has there, when a publisher was president of ASCAP?

A That's right.

Q Could you tell us now what your duties are as director of operations?

A Well, as director of operations I am responsible for the day to day management of the society. I report to the president, who, as you said, is the chief executive officer of the society --

THE COURT: I assume the president does not spend full time at the ASCAP office, that's more like the president of a social service agency or something of that sort.

THE WITNESS: No, he is a full-time president.

THE COURT: Oh, he is.

THE WITNESS: Yes. From time to time in the past past presidents have not spent full time, but our president does.

THE COURT: Is that a matter of choice or is that a matter of a request by the board of directors that

the job has now become such that it ought to be filled full time?

THE WITNESS: Well, it's a salaried job and it is filled full time and that is the intent of the board.

THE COURT: How long is the term?

THE WITNESS: He is elected at two-year intervals.

THE COURT: Is there any custom as to re-election?

THE WITNESS: I am sorry, your Honor.

THE COURT: Is there any custom or requirement as to re-election?

THE WITNESS: As to re-election? There is no limitation on re-election, no provision that it is required.

THE COURT: Has it been customary to re-elect presidents or not re-elect them or re-elect them for a certain period of time?

THE WITNESS: The present president has been in office for several -- a good many years.

THE COURT: Is that Mr. Adams?

THE WITNESS: That is Mr. Adams. But other presidents have varied in their terms of office. Paul Cunningham, who was the president prior to --

Adams, I believe was in office until he died. On the other hand, Deems Taylor, who was president prior to -- at a prior time was not re-elected as president but continued to serve on the board.

THE COURT: I see. All right. Thank you.

Q ASCAP has various departments, as I understand it, Mr. Marks, licensing, distribution --

A There are areas of management within -- underneath the president and the director of operations. We have some 640 employees and some 14 branch offices. Naturally, there are primary functions of the society. Those, as you said, are licensing, distribution, the normal financial or controller function, and under these functions are subsumed various departments that make these things work, so to speak.

Q Let me take you through each of those individually in just a moment, but first, as I understand it, there is also a public relations department?

A Yes, there are support functions underneath the operating areas and staff functions also, like public relations, like our chief economist, our statistical department. These would be supportive functions to the main areas.

Q There has been testimony here that someone named

Herman Finkelstein has been general counsel of ASCAP for sometime. Is that correct to your understanding?

A That is correct to my knowledge. General counsel is an officer of the societyunder the bylaws and he has a legal department. That is one of the supportive departments.

Q Does the general counsel report to you?

A No. As I said, he is an officer of the board, reports to the board.

Q How about the public relations department? Do they report to you?

A Yes, they do. These departments report to me and I report to the president. The departments may from time to time report to the president if he has something he wants to take up with them.

Q Are there various committees of the board of directors?

A Yes, there are.

Q Could you identify them for us, if there are any standing committees?

A Well, my recollection is that the standing committees are set out in the articles of association. I think they are the executive committee, I don't know whether the finance committee is a standing committee,

there are writer and publisher classification committees which are alluded to in the articles, but really met regularly in much older days, when writers and publishers were classified as regards their distribution by those committees. That is no longer the case.

Q There is also a law committee, I believe.

A Yes. I don't think that is a standing committee in the articles.

Q Are there any ongoing committees, regardless of whether they are standing or not?

A Well, the finance that I mentioned, I am not sure whether it is standing, the law committee. Then there is a special classification committee that deals with public domain arrangements, there is a survey and distribution committee, relief committee.

Q Now let's take the various functions that you described as being performed within the society, first, on the theory that without income there ain't nothing, let's talk about licensing. ASCAP, as I understand it, has a general licensing department or something like that?

A Yes. Well, the area is broken down as to the types of licenses that are offered. There is a department that is concerned with radio and television broadcast

licensing, there is a department that is concerned with what we refer to as general licensing, such as the licensees that are spread around the country, hotels, bars, grills, taverns, nightclubs, skating rinks, dance halls, any activity of that sort that is using music publicly and for profit, there is the background music kind of licensee, there is an area that is concerned with that, then there is an area of licensing that is concerned with symphony orchestras and concerts, serious music concerts, an area of licensing that is concerned with uses of music on college campuses and universities, educational licensing.

Q Let's see if we can get some numbers as to each of these. The general licensees that you spoke of, skating rinks, hotels, clubs, bars, amusement parks?

A In the neighborhood of about 30,000 of those.

THE COURT: Licensees?

THE WITNESS: Licensees.

Q And you spoke also of background music licensees. By those I take it you meant Seeburg and Muzak?

A That is correct.

Q How many --

THE COURT: 3M?

THE WITNESS: 3M, right, your Honor.

Q Do you have the figures on those licensees?

A My recollection is that there are about 1000 licensees and perhaps 100,000 locations that they service.

Q Is that Muzak, Seeburg and 3M all together?

A Well, it's a general figure. I think 3M, there are about 1400 locations, machines that are licensed.

Q As I understand it, dealing with Muzak, the society licenses Muzak and its franchise holders and they obtain sublicenses for their individual accounts, is that correct?

A That is correct.

Q How about symphony orchestras and concerts? How many of those do you license? Do you have that figure at your fingertips?

A Well, there are well over 100 symphony orchestras in the country today and they are broken down.

Now, I may be underestimating that figure, but you have symphony orchestras in major American cities, you have smaller community orchestras. They themselves divided themselves into categories. You have orchestras that have large budgets and those that have small and some that have none at all.

THE COURT: I recognize the variety, but are you implying that all or nearly all of the symphony orchestras in the country are licensees of ASCAP?

THE WITNESS: Yes, your Honor. I would say that all of those that do have an operating budget, charge admission for their concerts.

THE COURT: All right.

Q How about the college educational licenses that you spoke of?

A There are about 200 colleges and university licenses at the present time.

THE COURT: How does the question of profit come in there or does it?

THE WITNESS: Well, it may, your Honor. These days---

THE COURT: They run concerts tomake money.

THE WITNESS: I was going to say, these days a good many of the commercial concerts are now found on the college campuses.

THE COURT: Does the question of who the licensee is depend on who performs or where performed or what? I remember the Boston Symphony used to play regularly at Harvard. Who would be the licensee there?

THE WITNESS: At that point the Boston Symphony would have been licensed. I doubt that at that time we were doing -- the college licensing area is a relatively new or

THE COURT: You are correct in assuming that I wasn't at Harvard relatively recently.

THE WITNESS: We do have college promoters, that is, people associated with the colleges, who are doing the promoting, and a lot of the performance of music has moved to the colleges.

THE COURT: They become the entrepreneurs, in effect.

THE WITNESS: That's right.

Q Just to give us an idea of the skale, Mr. Marks, can you tell us what the Society charges a symphony orchestra for a license? The B.S.O., if you happen to have that at your fingertips?

A I don't have it at my fingertips, but I think an

educated guess would be something in the neighborhood of $10,000 a year.

THE COURT: You are talking in terms of money now? You say dollars?

THE WITNESS: Dollars.

THE COURT: I thought up to now we have been talking in terms of licensees.

MR. TOPKIS: I am sorry, your Honor. Just to give an idea of the skale, I thought we might know the figure as to the Boston Symphony.

THE COURT: I see.

Q How about a community orchestra, Mr. Marks?

A Well, it may pay a few hundred dollars a year or less.

Q Let's talk for a moment about radio and television. Does the Society license the radio networks?

THE COURT: Can I ask one question before that, please?

MR. TOPKIS: Please, your Honor.

THE COURT: Will you tell me, since you understand the dynamics of how an orchestra program is operated, anyway, better than some other things, how do you decide what the license charge will be to the Boston Symphony and how do you decide what it will be to a community orchestra?

THE WITNESS: Well, I believe under the major symphony orchestra contract it is a percentage of box office income.

THE COURT: They have a blanket license, in effect?

THE WITNESS: They have a blanket license. That was at one point related to musicians' salaries and there was a change in the contract to box office, but it still is related so that there isn't more than a certain percentage increase over what it was in the previous year.

THE COURT: With regard to community orchestra, do you also charge on the basis of box office or what?

THE WITNESS: My recollection there is that it may be a percentage of budget, your Honor.

THE COURT: Thank you.

Q Mr. Marks, it is suggested to me that the base rate for major symphony orchestras is one per cent of box office. Does that accord with your recollection? If it doesn't, you are going to have a fight on your hands.

A I would say whoever suggested that to you I am sure -- as I said, it is a percentage of box office, but it was related -- prior to going to a box office percentage it had been a percentage of musicians' salaries, and

there is still a relation, so that it won't increase more than a certain amount.

THE COURT: What I was really interested in was whether there was any element of per use licensing as to orchestras, and I gather there is not.

MR. TOPKIS: That's right, your Honor.

Q Mr. Marks, coming back to radio, the Society does license the radio net works?

A That's correct. There are four radio networks licensed.

Q You also license local radio stations?

A That's correct.

Q About how many of those?

A In the neighborhood of six to seven thousand.

Q Recently we have seen the development of all talk and all news radio stations. Has the Society developed special licenses fo rthose use?

A Yes, it has.

Q Do you have any idea how many of those are outstanding?

A No, I don't.

Q A relatively trifling number, would you say?

A A small number.

THE COURT: Is that for use of music in connection with commercials?

THE WITNESS: Yes, that is where the music is used on those programs.

THE COURT: Except where there is spontaneous music, a recorded parade, I suppose?

THE WITNESS: They may also have specialty programs, specialized programming, using music.

Q As to television, one way or another, I gather, the Society licenses the three television networks?

A That's correct.

Q How about local television stations?

A There are in the neighborhood of about 600 of those that are licensed.

Q Could you tell us as to radio stations what proportion of the radio stations, if you know, holding FCC licenses also hold licenses from the Society?

A Well, I would say a very large proportion. There are relatively few that aren't -- that don't hold licenses from the Society. There are always new stations that are coming into business, new licenses, transfers of licenses. We have recently concluded a new license agreement with the local radio industry and there is a process of re-licensing, so in the process of re-licensing there may be

some that are not licensed. But generally speaking almost all the local radio stations are licensed. When new stations come into the picture and new licenses we, following the FCC, report to that effect, will get in touch with the station to offer them a license, usually by correspondence. We also have station relations people who may visit them. A license then is usually agreed upon, they usually sign a license at that point.

THE COURT: Does K91 in Washington have a license now?

MR. TOPKIS: Right now?

THE WITNESS: I will defer to counsel on that one, your Honor.

MR. TOPKIS: I am happy to say yes, your Honor.

Q What is your procedure in the event that a radio station decides not to take an ASCAP license, if you have a procedure, of course?

A Well, yes, as I say, there is correspondence with the station explaining what the license is, what the need for the license is if they are using music in the ASCAP repertory, and if there is no response or a negative response, we will tape the station, that is, tape record it to see whether they -- to what extent they are using

ASCAP music, we will let them know about it.

If they still are using music and they dont have a license, an action may be brought after all the other efforts have been expended.

We have about 60 actions that were brought in the last year against local radio stations.

These actions may not go to judgment. They may be settled, stations may take a license during the course of the action.

There are settlement discussions during the course of the action.

THE COURT: What is there to discuss?

THE WITNESS: What a fee -- what the list fee would be for that particular station, and --

THE COURT: If you don't reach agreement on that in negotiations of that kind, is that also subject to Judge Ryan's jurisdiction?

THE WITNESS: Well, a station has the right, if it disagrees with the rate, to go before the Southern District of New York to have the appropriate rate --

THE COURT: Any station anywhere in the country?

Q Mr. Marks, are you familiar with the last round of negotiations with the all-industry radio committee?

A Well, I did attend negotiating sessions in that situation.

Q Do you remember what the history of the matter was, that is to say, was a committee appointed by the industry to deal with that step?

A Well, the committee that dealt with ASCAP was a committee, as I understood it, appointed by the National Association of Broadcasters, known in the industry as the All-Industry Radio Committee, supported by a large number of local radio stations. They represented the stations who supported them and they were petitioners before the

Federal Court and they had an interim fee that was in existence at the time in negotiations which took place under the aegis of the Court until a settlement was arrived at.

MR. TOPKIS: I think the records of this Court leave no doubt about it, your Honor. There is presently pending, I might say, an application by a group of Georgia broadcasters who believe that their situation is somewhat different from that of the general industry run and back in 1958 or 1959 we had an application by a group of Washington broadcasters.

There have been different applications down through the years by individuals and groups of broadcasters.

THE COURT: Right.

Q Mr. Marks, you have told us what you do when a radio station is unwilling to take a license. Do you follow a pa allel procedure with television stations?

A Yes, I would say so.

Q When the Society issues a license to any of these various kinds of users, that is to say, general, radio, television, background, what is it that the Society licenses?

A It is licensing the right to publicly perform for profit the non-dramatic uses of music in the Society's

repertory.

Q Right now can you tell us what makes up the Society's repertory?

A Well, the Society's repertory is made up of works written and/or published by the Society's members. Under its agreement as a member creates a piece of music, it enters the Society's repertory.

Q And does a work created by a member of a foreign society with which the Society is in contractual reations similarly come into the Society's repertory upon its creation?

A That's correct. It is -- well, it comes in the Society's repertory at the time it would enter the repertory of the foreign society. The Society has agreements, as we pointed out before, with a number of societies around the world who, similar to ASCAP, are made up of writer and publisher members. We, by our agreement, represent those societies for the performance of music in their repertory in the United States along with the music of our own members.

Q There has been testimony here or reference in the testimony here, Mr. Marks, to a performed works index created by the Society, and I have here what I understand

is that index. I will give my friends of course all the opportunity they want to look at it before offering it in evidence, but right now I will just ask you to identify it. I will ask my strong-backed friend to show you these volumes which we will put in front of you. Can you identify those for us?

A Yes, those are the most recently bound volumes of works which appeared in the Society's survey of performances.

Q So only those compositions in the Society's repertory which have actually achieved performance and be located by the Society's survey we will describe shortly, are listed there, is that right?

A That's correct.

MR. TOPKIS: Could we have a number assigned to that? It is AX236 now.

Q Now we will show you three volumes of computer printouts, Mr. Marks, and ask you to identify those if you will, and I think they have been marked 237 for identification, AX237 for identification.

THE COURT: These are again com--

THE WITNESS: These again are computer printouts of works which have been performed in theSociety's survey, speaking as of the dates of t he printout, and which supplement the 1963 volumes.

Q '63 and '66, I believe, is that correct?

A Well, there have been additional printouts since then. The only bound volume in '63, there were subsequent supplements, I believe, in '69 and '70.

THE COURT: Is the supplement inclusive of the works contained in the bound volumes or just licenses only additional works?

THE WITNESS: Additional works, your Honor.

THE COURT: In other words, if it is already in the bound volume it won't show up in the supplement too? I don't know if it makes any difference.

MR. TOPKIS: I think your Honor is right.

MR. HRUSKA: It makes a little difference to us, your Honor. May I just inquire of counsel whether the printouts that you have just shown the witness are the same printouts that you supplied us with as printouts of the performed works index?

MR. TOPKIS: They were supplied by Sullivan & Cromwell, I am told.

MR. HRUSKA: The bound volumes were supplied by Sullivan & Cromwell, as part of the discovery process in this case ASCAP did purport to supply us with printouts of the performed works index.

My question is whether the printouts you have

just shown the witness are the same printouts that you supplied CBS with?

MR. TOPKIS: There seems to be some uncertainty. I will let you look at it and satisfy yourself, sir. That is the easiest thing.

MR. HRUSKA: I am not going to satisfy myself by looking at them right now.

MR. TOPKIS: No, I am not offering them right now.

THE COURT: Mr. Hruska, you look at them and tell Mr. Topkis and his associates if they are the same or not.

MR. HRUSKA: All right, but I don't think it is going to be --

THE COURT: You have your own reasons to want to know that so you can be sure what you are talking about.

MR. HRUSKA: Exactly.

THE COURT: However, I am asking a question not to know what you are talking about, but just to know what the exhibit is, and I am not quite clear what the answer is. Whether the supplements are what I would call cumulative -- in other words, whether they include the material that is in the bound volumes or do they go on from that?

THE WITNESS: My understanding, your Honor, is that they are not cumulative supplements. I would have to double check to be sure of that answer. That is my best recollection.

MR. TOPKIS: They are marked as supplements to 1963 and 1969 editions, your Honor, which would suggest that they are supplements rather than cumulative.

Q Mr. Marks, there has been reference here frequently to blanket and per program ASCAP licenses relating to radio and television. Are there any per program licenses today outstanding?

A I don't believe there are.

Q In neither field?

A Radio or television.

Q To your knowledge have there on occasion been radio or television per program licensees?

A Yes, there have been in the past.

Q Let's come now to non-broadcast users, that is to say, general licensees. How does the Society go about licensing them?

A Well, you remember I mentioned that we have 14 branches, branch offices, around the country. These licensees that you are referring to are the small users that are spread around the country. It is necessary to first identify

then to approach them, to talk to them about the fact that they are using music, that if they are using music the person whose music they are using is entitled to be paid for it if they are using it publicly for profit, and we have a field staff of employees, about 140 or 150 employees who are employed in these branch offices who visit these establishments, write to them, talk to them about the use of music, the need for license, need to pay for the use of music, to pay somebody for the use of music if they are using that person's music, and if we are not able to conclude an agreement, and if the music remains unlicensed, then we would have what we refer to as an inspection of the establishment by some local people who are expert in music.

They may be people connected with local college, university, high school music teachers, somebody who is acquainted with the kind of music that is being used in the establishment.

They would visit the establishment while it is using the music, make memoranda as to the use of that music, what music is being used, the titles.

Q If it were a restaurant they would go into the restaurant and sit down and order supper and meanwhile listen to the music.

A Exactly. These people as I say will make notes, memoranda of what they have heard. We would advise the establishment that they are continuing to use music and if necessary an infringement action will be brought against the establishment.

Q Does the Society, when it sends these people into a restaurant or a bar, use recording devices of any kind or do you rely on the notes and recollections of your people?

A We do not use recording equipment. We do rely on the individual who is going into the establishment, and his knowledge of music -- his or her knowledge.

Q The Society maintains no -- you said that you brought litigations when necessary. About how many per year?

A I'd say in the neighborhood of about 300 actions are brought a year.

THE COURT: Does your own legal staff handle that or do you have local counsel or does it depend on how serious the case is?

THE WITNESS: Your Honor, I would think that in every case that is brought there is a local counsel involved.

We do have local counsel around the country wherever it is necessary to bring these infringement actions. We do have a large number of local counsel.

Q In whose names, Mr. Marks, are these infringement actions brought?

A In the name of the copyright owner.

Q Not ASCAP?

A No, not ASCAP.

Q When an action is successful and judgment is recovered and you receive some proceeds from the judgment, what is done with those proceeds?

A It goes into the general fund but in fact the cost of bringing these litigations exceeds the proceeds in the way of settlement.

THE COURT: Out of curiosity, is the charge of litigation also against the general fund or is it against the particular copyright owner?

THE WITNESS: The charge is against the general fund, the overall overhead expense, your Honor.

Q When suit is brought in a member's name, Mr. Marks, is the member advised of that fact?

A Yes, he is. Usually the member is called to let him know about the suit, and also to obtain sheet music from him because it is part of the complaint that is filed.

Q The sheet music is annexed to the complaint?

A That's correct.

MR. TOPKIS: Your Honor, I am about to go to a different subject.

Would it be convenient now to take our afternoon recess?

THE COURT: Yes.

(Recess.)

End 4A PM

BY MR. TOPKIS:

Q Mr. Marks, again in the interest of scale, could you tell us as to the largest receipts that the Society had last year from no one local radio station, what was it, do you recall?

A I think it was something in the neighborhood of 150,000 or 200,000, maybe about $180,000.

Q And how about local television?

A Probably something like 350,000 to $400,000.

Q Do I understand that annually the Society distributes to its members a financial report audited by Arthur Young and Company in recent years?

A That's correct.

Q I am showing you Exhibit 232 for identification. I ask you whether that is a copy of the one most recently distributed just a month or so ago?

A That's correct. It's dated March 1973.

MR. HRUSKA: We have during the break had a chance just to skim through this. I don't think we have any objection to it your Honor, if the offer is limited to the fact that the accountants rendered this report rather than it being offered for the truth of everything in it.

THE COURT: Well the fact that they send a report-- I don't know what you are offering it for.

MR. TOPKIS: I am offering it for the truth of our revenues and disbursements and so on.

THE COURT: It's a certified report I suppose?

MR. TOPKIS: Yes, of course.

MR. HRUSKA: It is certified?

THE COURT: At least prima facie it probably is, and it's a regular business report so I think it would be admissible as such, Mr. Hruska.

If there is no reason to doubt its validity you are perfectly free to call witnesses on that point; but I think it's admissible for the truth of its contents; at least for the truth of its figure contents.

I don't know whatother text there may be.

MR. TOPKIS: Right.

MR. HRUSKA: There is some other text.

MR. TOPKIS: If you are concerned about the notes relating to escrowed receipts and so forth, I don't insist on them. I am not concerned with that.

MR. HRUSKA: All right.

THE COURT: All right, we will exclude the escrow receipts and if there is any note referring to this case--

MR. TOPKIS: I don't want that either.

xx (Defendant's Exhibit AX232 received in evidence)

MR. TOPKIS: Would your Honor care to take a look

at it? Perhaps I can just call attention.

THE COURT: I will sooner or later. If there is something particular you want to call your attention to, simply read it.

MR. TOPKIS: I wanted again in the interest that you should have an idea of the scale we are dealing with, this reveals that our--

THE COURT: Are you trying to prove, to make a bad pun, it's on a major scale or a minor scale?

MR. TOPKIS: I don't often get shut up totally but I am right now. Your Honor this reveals that for the year ended December 31, 1972, the Society had domestic receipts from television, that is network and local, of 32 and a half million, almost 18 million from radio, 8 million from general and background music, $313,000 from symphonic and concert, total domestic receipts of a shade over $80 million, and royalties from foreign societies of $9,200,000 for total receipts of $89.5 million.

Administrative expenses of $14.5 million, leaving an excess or leaving a sum distributed of $52.9 million.

THE COURT: There is something missing.

MR. TOPKIS: I was omitting a number of things.

THE COURT: The rest was legal fees or what?

MR. TOPKIS: No, no.

THE COURT: Because there is 69 and a half million and some 14 and a half million in administrative expense would leave 55 under normal circumstances.

MR. TOPKIS: Right. Under the heading of administrative expense I include all expenses really. Overhead would perhaps be a better term.

I might say your Honor that we distributed about 49 million to members and 3.5 million to foreign societies, so that in addition to its other major accomplishments, the Society contributed about $6,000,000 to redressing the adverse balance of payments of the United States this past year.

Q All right. Now Mr. Marks, let's discuss for a few minutes the functions of the controller of ASCAP.

Who is that person at the present time?

A Mr. Carl Levinton.

Q Will you spell the name for the reporter, please.

A L-e-v-i-n-t-o-n.

Q What operations does the controller have under his jurisdiction? Before I ask you that, let me ask you this:

Does the controller reporter to you, sir?

A Yes, he does.

Q All right. Now, will you tell us please what

activities or operations he has under his jurisdiction?

A He exercises the normal control functions. He has responsibility for developing the Society's budget, for reviewing the budget with the various departments. He also has the various accounting departments within the Society reporting to him.

There are of course departments, accounting departments that are concerned with accounts receivable from licensees, accounts payable to suppliers, he shares responsibility with the distribution manager for supervision of the royalty accounting department that makes payments to members: He also has reporting to him the auditing department.

The auditing department has the function of auditing the Society's licensees to see that payments are made appropriately under the Society's license agreements.

Q Let's come to that in just a second. Just in terms of general headings did you mention information systems?

A No, I hadn't. He also has reporting to him the Information Systems Department, which has responsibility for developing systems within the Society with regard to the carrying out of the mechanical processes of the Society?

A large part of that department is the electronic data processing area, which is part of the Information Sys-

tem Department.

Q For how long has the Society used electronic data processing devices or computers as I think they are generally called?

Would that be right?

A I think they are the same thing. Computer is probably a more general term. I didn't claim to be an expert in either of them, but we have used computers in house since some time in the sixties, the early sixties.

Prior to that we were a client of Service Bureau Corporation, the IBM Service Bureau Corporation.

Q Do I understand that the computers are used in connection both with the survey that the Society makes of performances, the end product of which we saw in those volumes that you identified before, and also in making payments to members?

A That's correct. Well, the computers are used for a number of functions. The major function I would say at the present time is the distribution function, the determination--the processing of the data which is produced as a result of the Society's survey of performances; and the translation of that data eventually into distribution checks which go to members.

Of course the computers are used for other billing

functions to our--to licensees under certain circumstances, local radio; they now serve a billing function, and they are used in the computation of material for other areas of society, licensing as well as distribution; but the major function is distribution, and historically that's the way the use of the computer developed when we were with the Service Bureau Corporation.

We decided to go in house because after we were a very large client of Service.

I think they told us we were the largest non-military, non-governmental client of Service Bureau Corporation at the time we used them, and in fact they used to fly the distribution to London because there is a submarine base where they had the computer and after they got the submarines off the computer they put ASCAP distribution on.

We found that the costs that they had initially quoted to us in their first couple of years, first year of operation, had--I believe they had doubled when they came back.

THE COURT: Can I save you some trouble by suggesting that it simply becomes cheaper to own a cow than to buy milk?

THE WITNESS: Your Honor put it very well. We were rather unpleasantly surprised by that fact but that was the fact.

Q Do you happen to know, Mr. Marks, the cost of your cows?

THE COURT: You mean the annual cost?

Q No, I mean the purchase cost of the equipment that you now have.

A Well, we don't own the equipment, you know.

Q You lease it?

A We lease the equipment we now have.

THE COURT: That is another antitrust case we will get to some day.

MR. HRUSKA: I hope not, your Honor. We have enough work in our office, your Honor.

Q All right, Mr. Marks, what is your annual bill for operating this equipment both rental of it and maintenance care and feeding and whatever else goes into it?

A I don't really recall what the annual bill is at this point.

Q Perhaps we can find out.

A I am sure we can.

THE COURT: I am prepared to believe it is rather large.

THE WITNESS: Yes, it is.

Q Mr. Marks, you were going to tell us a little bit about the auditing the Society does. What kind of licensees does the Society audit?

A The Society audits those licensees where the license involves something other than a flat payment, and therefore there is a question of whether the licensee is reporting correctly under the license.

For example, in the case of local radio, local television orin the case of network television prior to the most recent agreements, the agreement called for a percentage of gross revenue after certain deductions. Then there is an auditing function in determining whether those payments are correct in line with the percentage is correct, correctly computed, whether the base against which the percentages are computed is correct, whether the deductions are correct.

That would be the purpose of the audit.

Q So the Society has audited radio and television licensees?

A That's correct.

Q And also --

A Hotel licensees. The hotel agreement deals for a fee based on a range of entertainment, expenses for entertainment.

Q And any other licensees?

A Background music licensees.

Q There is a percentage involved in that license, too?

A That's correct.

Q Can you tell us, sir, how many employees the auditing department has?

A In the neighborhood of about 50 employees. 35 to 40 of them are auditors.

Q Do they travel around the country?

A Yes, those are concerned with auditing stations and hotels around the country, travel around the country. Others are located in this area, have auditing functions in this area.

Q Can you tell us how many audits the Society conducts annually?

A In the neighborhood of about a thousand.

Q And in recent years has the Society received additional license fees by reason of these audits?

THE COURT: You mean found money that wasn't reported?

MR. TOPKIS: Exactly, your Honor.

A Yes, well, the most recent year, it was something approximately about a million and a half dollars that came in as the result of audits. That figure has been higher and lower in prior years depending upon the audit activity or the state of the agreement. As high as I think something like $3.5 million a couple of years ago, three years ago when we included local television contracts.

Q We have heard discussion here to the effect that the Society makes a survey of performances of its music. First, I gather that that survey is required or a survey is required under the terms of the amended final judgment or what my friends would call the ASCAP consent decree?

A That is correct, but whether there was a judgment or not, a survey would be required to distribute the money that the Society collects because this money comes in on a blanket basis and -- one of the things that has to be done of course to try to pay out on a fair and equitable basis to those members of the Society who are responsible for the performances, and the sur vey is a method of allocating receipts of the Society on a fair and equitable basis.

Q The survey was designed by outside consultants employed by the Society, is that right?

A That's right, Joel Dean Associates, Inc.

Q That is an independent consulting firm?

A That's correct.

Q Who is or was Mr. Dean?

A Well, Mr. Dean was a professor at Columbia. I think he is Professor Emeritus at Columbia at this point.

Q When was the current survey established by Mr. dean or Professor Dean?

A The current survey was designed in 1959, went into effect in October 1959. Thatis the survey with the design which is in the main in effect. There have been a number of changes over the years.

q But Mr. Dean sketched in the broad outlines in '59 and since then ithas been modified from time to time?

A That's right. He designed it initially and it has been in effect ever since.

Q Is there any other outside consultant invclved in the design or implementation of the sur vey?

A An organization called Research Consultants, Inc. which has the responsibility of scheduling the survey in line with the design and the sample that has been chosen by Dr. Dean, by Joel Dean Associates. Then there are the distribution advisers. As part of the decree --

Q The amended final judgment you mean or consent decree or whatever?

A I am sitting close to the CBS table. I may be affected.

Q Fair enough.

A The District Court appointed two distribution advisers who were independent of the Society and report to the Court. In 1960 I believe those appointed were Senator Ives and Judge McGeoghan. Senator Ives was too ill to serve, Judge McGeoghan served as the distribution adviser to the District Court until his death and then Judge Ryan appointed Warren Olney and Leo Kaplan as distribution advisers.

Q Is that the Warren Olney who was formerly head of the criminal division of the Department of Justice?

A That's correct. I think he was also in charge of administration of federal courts.

Q Does Mr. Olney have particular responsibility for west coast and Mr. Kaplan for east coast activities?

A Yes. Mr. Olney resides on the west coast, has his office there, and Mr. Kaplan is on the east coast, so that they are available to members on either coast.

Q What function do these distribution advisers serve?

A They have the responsibility of advising the district court concerning the survey of the society's performances and distribution to its members and they are available to members, they attend meetings of certain committees of the society that are concerned with these areas, and they make regular reports in writing to the court which are then commented upon by the Department of Justice and ASCAP, printed, and then mailed to the members. Those reports are made customarily twice a year.

THE COURT: Is their function primarily for the purpose of seeing to it that the decree is adhered to

or is it to make recommendations to the Court about methods of distribution? The methods of distribution are determined by ASCAP itself, are they not, or by ASCAP under the decree?

THE WITNESS: Yes, your Honor, by ASCAP under the decree with the aid of experts in this area, and their responsibility I would imagine is to comment on whether these things are appropriate under the decree or judgment.

Q Now coming to the survey itself, what is it that is surveyed?

A Well, the performances of the society's members are what are surveyed, and they are surveyed in the various media which are licensed by the society, and the way in which the survey differs by media, given the appropriateness of the method and the particular circumstances of the media.

Q Let's start with radio, local radio. What is surveyed there, what is done in connection with performances on local radio?

A Well, you remember we mentioned that there are in the neighborhood of 6000 to 7000 local radio stations. In designing the survey of local radio we were advised that it would be economically impossible,

unfeasible to count all the performances of our members' works in local radio. So it was necessary to design a scientifically randomized sample of performances on local radio.

What happens is that we each year make a listing of the -- all the local radio stations that pay the society a license fee the most recent annual period subdivided by the kind of data that Joel Dean Associates has designed into the sample. In designing the sample Joel Dean Associates has stratified the data so as to provide a reliable performance picture of what is performed over local radio in the United States.

For instance, the data is grouped by type of area. There are nine census regions in the United States, it's broken down by census region. Within the census region it's broken down by metropolitan location, rural urban location, or metropolitan. These are census designations, census department designations, I believe. Within that they are broken down by revenue grouping, so that stations paying the society a certain amount of money are grouped together by location. There are some 50 or so subgroupings within this total overall list of 6000 or 7000 stations, and this data is given to Joel Dean Associates each year.

The sample is then randomly selected from this stratified data. The stations themselves are randomly selected, the day of the week in which they would be sampled, starting time, etc., and in recent years this sample has been chosen by computer. The sample is then given to Research Consultants Inc., which is another outside body. The Research Consultants Inc. then schedules the taking of the sample over the sample year.

The performances themselves are physica surveyed by means of tape recordings. Tape recordings are made of local radio stations in six-hour units. These are taken by people who are located in the areas of our 14 branch office cities, and for those areas that are not, of course, that means the bulk of the country that is not covered by those cities, we have people who travel and take these tape recordings on instructions from Research Consultants Inc. in accordance with the design by Joel Dean. This traveling function has been served by our auditing department in addition to their auditing function.

Q Do I gather then that one of our auditors will rent a motel room, turn on a tape recording device on a radio when he leaves in the morning, come back at the end of the working day, having conducted an audit, and turn

it off?

A Well, in effect, yes, that is what happens. He has instructions that he has received for the taping of a particular station at a particular time. He can't deviate from that. He sets his machine that he is carrying with him, he is carrying a small receiver as well, and a timing device, and the 6-hour unit is recorded. He then mails that to the society, where that tape is monitored.

Q How many hours of local radio broadcasting does the society record annually in this fashion?

A Well, the local radio sample is about 60,000 hours.

Q Do I gather that substantially the same kind of procedure is followed with reference to local television stations?

A Yes, with this difference; The local television format lends itself to surveying not only by tape recording but also by cue sheets, because a good deal of the programming is the kind of pre-filmed or pre-taped programming that will have the music data on cue sheets. So that in addition to the tape sample of local television there is a sample by means of use of TV Guide. TV Guide has sections of the

guide for each area of the country and a sample will be chosen of programming, again based on the factors that we discussed initially, the revenue to the society, the type of location, the census area, etc., a sample will be chosen from these TV Guide publications from all areas of the country, and the society will then have not only a tape source but will also have a cue sheet source for information, music information for programming in the sample chosen. It may have tape for the sample period of programming chosen or it may have cue sheets or it may have both or either one.

THE COURT: Mr. Topkis, I am afraid I am going to have to terminate today's proceedings at this time. I am sorry, I have to rule on some motions in another case.

Suppose we start a little bit earlier tomorrow, try and make up for what we have lost today. Quarter of ten be convenient for everybody?

All right, I will see you at a quarter of ten.

(Adjourned to 9:45 a.m., May 30, 1973)

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JOSEPH TRACHTMAN

ADMITTED IN THE DISTRICT OF COLUMBIA ONLY
BERL BERNHARD
HARRY C. McPHERSON, JR.

ADMITTED IN CALIFORNIA ONLY
NORBERT A. SCHLEI

February 12, 1974

DELIVER

Southern District Court Reporters
United States District Court House
Foley Square
New York, New York 10007

Re: CBS v. ASCAP, et al.

Dear Sirs:

This letter embodies a list of corrections to the trial transcript in the above-captioned matter for May 29, 30, and 31, 1973, which have been agreed upon among all counsel. Please prepare an addenda sheet containing these corrections and furnish copies of the same to the undersigned. Thank you for your cooperation.

May 29, 1973

Page	Line(s)	Error	Change to
2307	12	we	you
2307	16	weekends	weekend,
2307	19	cooperationand	cooperation and
2308	6	giave	gave
2309	7	programming methods?	"Programming Methods"?
2309	22	tital	title

Page	Line(s)	Error	Change to
2309	22	called CBS	called "CBS
2309	23	backup for expert testimony	Backup for Expert Testimony."
2311	13	was the	was for the
2314	15	therewould	there would
2315	6	Wire area telephone service	Wide Area Telephone Service
2315	14	cos.	cost.
2317	14	y our	your
2317	14	programming methods	"Programming Methods"
2319	17	--hat	that
2321	18	routine	routinely
2323	8-9	programming methods	Programming Methods
2323	14	says enclosed	says "Enclosed
2323	16	reproduced.	reproduced."
2324	23	sheetwas	sheet was
2328	5-6	title appear/in Paris	title "April/in Paris."
2328	20	Amore?	Amor?
2331	9	thinkyou	think you
2331	19	visage	envisage
2333	10	is	are
2333	11	ont he	on the
2333	16	thatwe	that we
2337	9	therewas	there was
2337	15	tous	to us

Page	Line(s)	Error	Change to
2337	22	entieled	entitled
2338	16	more	move
2339	6	not.'	not.
2339	9	indicat ion	indication
2340	19	Q 226	Q AX 226
2340	23	ASCAP	ASCAP's
2340	25	bot her	bother
2342	12	wouldbe	would be
2343	15	tothose	to those
2343	22	ins	in
2344	5	no tgoing	not going
2344	18	T HE	THE
2348	8	minute to	minute to the
2349	7	18	81
2351	20	reducible	irreducible
2352	7	regarding	in regarding
2353	2	ruling	rulings
2353	15	transcirpt	transcript
2356	7	of	have
2358	4	that that	that
2358	5	with is a	with a
2358	20	can say,	can say is,
2360	4	BRody	Brody
2360	11	indutray	industry

Page	Line(s)	Error	Change to
2360	17	action,	action, or
2362	15	Brodsky	Brody
2363	14	negotiationss	negotiations
2364	9	attractice	attractive
2364	24	think we	think if we
2365	21	publihsers	publishers
2365	24	Hal	Al
2365	25	existe	exists
2367	7	to	so
2367	17	Sagelstein	Segelstein
2367	23	evidnece	evidence
2368	4	backgroundmusic	background music
2369	5	attemptingto	attempting to
2370	3	restraing	restraint
2370	10	withstanding	with standing
2370	22	theform	the form
2374	5	part y	party
2374	6	deliverately	deliberately
2375	10	tht	that
2375	17	plaint iff's	plaintiff's
2375	19	strain	string
2375	20	our	your
2375	20	and/or	on our
2376	17	plaint iff	plaintiff

Page	Line(s)	Error	Change to
2377	6	persued	pursued
2377	18	we have	we would have
2378	7	cour	our
2378	12	know	no
2380	12	licenses.	licenses."
2380	12	black list,	bypass,
2380	12	to	"to
2380	15	programming.	programming, CTN would be at a competitive disadvantage vis-a-vis NBC-TN and ABC-TN."
2381	2-3		(delete entire sentence)
2381	5	t he obtainable	the unobtainable
2381	13	vexily	veritably
2381	20	in antitrust	in an antitrust
2381	20	importan ce	importance
2383	2	manage	manager
2383	7	T his	This
2383	17	wouldn't	will not
2384	18	ASCAP	CBS
2385	11	inthe	in the
2385	12	p one	prone
2385	14	publishers	publisher
2385	23	between	because
2386	3	pr ovide	provide
2386	22	that	television

Page	Line(s)	Error	Change to
2388	14	-ayment	payment
2388a	5	fo r	for
2389	9	and--perhaps	and programs
2390	2	inthe	in the
2390	15	WE	We
2390	22	Siegelstein	Segelstein
2390	22	inevitaably	inevitably
2391	6	eight	either
2391	17	big shrug.	large amount.
2391	19	those nowthreenext	those--now three, next
2391	20	two variety	two--variety
2391	24	condensce	condense
2392	2	else getting	else and it is getting
2393	8	man not	man, not
2393	9	group he	group, he
2393	9	almostalways	almost always
2393	18	off	for a
2393	19	finite limited	finite, limited
2393	21	April, and	April--and
2393	22	byApril	by April only
2394	7	have	have been
2394	13	evenif	even if
2394	14	be according	be, according
2394	14	any way	anyway,

Page	Line(s)	Error	Change to
2394	18	tobelieve	to believe
2394	20	to the	to
2394	21	Andwe	And we
2394	22	simplyto	simply to
2394	23	nine	nine,
2395	3	were no	were--no
2395	4	there	their
2395	4	were reasons	reasons were
2395	6	deal, and	deal--and
2395	24	from	for
2396	10	programs because	programs--although
2396	10	things	things,
2396	11	that, because	that--because
2396	14, 15	saboutage	sabotage
2396	16	risk	risk and
2396	24	inherently more	inherently a more
2397	8	finances	financials
2397	12	maintaining the	maintaining that the
2397	14	on	of
2397	14	of the	than the
2397	15	precise testimony	present system
2397	17	interest	interests
2397	19	interest.	interests.
2397	22	thiank	thank
2398	14	overthe	over the

Page	Line(s)	Error	Change To
2399	2	DOes	Does
2399	3	theylike	they like
2400	4	reveal	review
2400	12	designated exhibits	admitted in evidence
2401	5	bar, worked in apprenticeship	bar, I worked in an apprenticeship
2401	9	J.	Judge
2402	3	distrib ution	distribution
2402	4	phycially	physically
2402	21	publishers	published
2409	2	TOP KIS	TOPKIS
2409	3	AX23	AX234
2409	10	agin	again
2409	14	or friends of	our friends have
2410	3	thsi	this
2410	6	could.	could--
2410	10	Couldwe	Could we
2411	9-10	was marked for identification)	was received in evidence)
2412	5	as the case may be	must be standard or serious
2413	14	ar	are
2413	15	mememberS	members
2417	5	societyunder	society under
2421	25	tomake	to make
2422	11	n w	new

Page	Line(s)	Error	Change To
2422	12	T HE	THE
2422	14	T HE	THE
2422	20	skale	scale
2423	10	skale	scale
2423	12	T HE	THE
2423	21	T HE	THE
2425	9	net works	networks
2425	18	fo rthose	for those
2430	18	pa allel	parallel
2433	10	wor ds	words
2433	11	suppleme nt	supplement
2433	22	Cromwell as	Cromwell. As
2434	16	Y ou	You
2436	2	then	them
2440	5	from no one	from one
2441	14	whatother	what other
2442	18	$80 million	$60 million
2443	23	reporter	report
2446	10-11	Service. I think	Service, I think
2447	16	T hat	That
2448	14	orin	or in
2450	21	sur vey	survey
2451	9	dean	Dean
2451	11	Thatis	That is
2451	15	ithas	it has

Southern District Court Reporters

Page	Line(s)	Error	Change to
2451	19	sur vey	survey
2456	10	physica	physically
2456	16	h-ve	have
2456	20	auding	auditing

2458- 11

OFFICE COPY ENTERED

UITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

OLUMBIA BROADCA[illegible]G SYSTEM

vs.

MERICAN SOCIETY OF COMPOSERS,
UTHORS & PUBLISHERS, ET AL.,

DEFENDANTS.

Before:
HON. MORRIS E. LASKER,
District Judge

69 CIVIL 5740

New York, May 30, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, Authors and Publishers

New York, New York.
May 30, 1973 - 9:45 A.M.

(Trial resumed.)

MR. BAKER: Your Honor, I would just like to make a brief request now which I think may save a good deal of time later on.

THE COURT: Yes.

MR. BAKER: ASCAP has submitted to us a music study, and there is certain data in connection with that study which I think will be necessary for us to make some reading on its accuracy.

THE COURT: What study are you referring to?

MR. BAKER: An ASCAP music study, not similar to ours but presumably with the same general kind of information in it.

THE COURT: What is it you request?

MR. BAKER: Well, we have already been supplied with a copy of AX233, which is a document which reads on that study for the period 1972, and we would also like the

similar documents relating to the other periods of the study.

In addition, we would like to know what the station hookup multipliers were.

Third, the programs on the study are identified by program code number, and it is my understanding that ASCAP has a list matching program code number to program name so that we --

THE COURT: There is really no point in you and me having this conversation. Somebody from ASCAP, whoever understands what Mr.Baker is talking about, ought to be listening so they can respond.

MR. TOPKIS: I was just trying to find out, your Honor. That was my problem.

THE COURT I see. Can I suggest that at such time as this sentencing comes up this morning that you people talk this over and see if you can solve it without my intervention but otherwise of course I will be glad to assist you.

MR. TOPKIS: We will be glad to.

P A U L M A R K S resumed.

DIRECT EXAMINATION (continued)
BY MR. TOPKIS:

Q Mr. Marks, when we broke off yesterday afternoon,

as I recall, we were talking about the survey and I had asked you, as I remember, about how local TV and radio performances are surveyed, and you had told us that there were some 60,000 hours of local radio surveyed annually, taped annually.

A That's correct.

Q Could you tell us, sir, how many hours of local television are taped annually?

A Well, the local television sample consists of 30,000 hours. Not all of those are taped though. As I explained yesterday, the sample is taken from cue sheets as well as from tapes, and the total sample size is about 30,000 hours. The tape unit in television is three hours, although a six-hour tape is taken because more television is occupied by network time, and the network time is of course excluded from the local sample when those performances are monitored.

Q You are just out to analyze the local performances, is that right?

A That's correct.

Q Can any member of ASCAP know in advance when a radio or television station is to be taped?

A No, no, as Joel Dean points out in the design

of the sample and in the booklet that was disseminated to the member ship, one of the elements of this sample is surprise. Neither the station nor the member nor anyone at ASCAP except the person who is directly concerned with taking the sample knows of the time, date or station to be sampled.

Q So that there is no opportunity for the operation of what I some years ago heard referred to as the institution of payola?

A That's correct.

Q All right, so as I gather it, a great many tapes are made, assembled in the field, and are they then sent back to New York?

A That is correct.

Q What is done with them here?

A At our New York office those tapes are monitored, that is, they are licensed to by tape listeners who then note down the performances, the music performances to the tape on a program form.

The program form is then sent through the distribution mechanism --

Q Excuse me before we leave that. How many monitors are there, how many people listening?

A Oh, in the neighborhood of about 40.

Q Well, let's see, if you were listening to 60,000 hours of radio and 30,000 hours of television, that's about 90,000 hours. That's well over 3000 days of broadcast, 24-hour days, ten years of broadcasting listened to each year, is that right?

A I will accept your estimate of the time, Mr. Topkis. I haven't computed it on that basis. Actually, you will recall I said that they did not listen to 30,000 hours of television. That is the size of the sample. The sample is made up of --

THE COURT: I know know whether you are simply trying to emphasize the literal number of hours that is monitored or whether you are trying to emphasize the effort that somebody puts into listening to all this.

MR. TOPKIS: It is the effort, your Honor, and the techniques employed.

THE COURT: It is very interesting, but what is the significance of it, Mr. Topkis, in the case?

MR. TOPKIS: Well, if we ever were to go to a per use system, your Honor, I think we would have to do a lot more than this.

THE COURT: All right. At least I understand the rationale.

Q So these 40 people listen to all of these tapes?

THE COURT: How do they recognize the melodies?

THE WITNESS: Well, these are people who have an expertise in music. Some of them may be expert in -- some of them may have specialties, particular kinds of music, but they all have ability to listen to an recognize what they hear. Some of them are what are referred to as solfegg sts.

Q How do you spell that?

A S-o-l-f-e-g-g-i-s-t.

Q What is that?

A Solfeggist is one who has the ability to listen to music and take down the notes which are -- which make up the music, copy down the notation by merely hearing the music.

Q I see.

A If there are problems in identification of the music, there is a system whereby the actually -- the tape -- each listener is at a tape machine, and there is a central listening board, something like a language -- as a matter of fact it is an adaptation of a language learning class where the teacher can listen in to each machine from his central source, so that if someone has problems with a tune, the supervisor can key into that machine and listen to it.

A specialist in that area can listen to it. If it can't be identified a solfeggist will notate it and there is an actual index of solfeggist notations so that if a song is subsequently identified they can go back and pick up those that haven't been.

Q I see, so as the result of these techniques, you wind up with a list of all of the compositions that have been performed or all of the ASCAP compositions, which is it, that have been performed on local radio and TV and picked up in your sample?

A At the point that t he listener is making up that program sheet, he is not concerned with whether he is listening to ASCAP music or non-ASCAP music. He is putting down all the music that he hears on that program.

Q So you have a list of all the music that has appeared on the programs that you have taped?

A That's correct.

Q Let's stop there for a second and go to other sources of lists. What do you do about network television?

A Network television is surveyed on what is referred to as a census basis rather than a sample basis, census being a complete count of the data that we receive from the network concerning performances on the network.

The network will send program logs to the

Society for the programs that appear on the television network, and those will be included on a complete basis rather than on a sample basis in the distribution mechanism.

BY THE COURT:

Q Let me ask you this: In view of the fact that all of the networks have blanket licenses and that your compensation is not, as this very case attests, affected by the number of compositions that are played on the networks, what is the purpose of monitoring the music that is played on the networks?

A Well, this, the purpose, your Honor --

Q To set the fee for the following negotiations?

A No, to allocate the money as it comes in from the network sources to the members.

Q Sure, of course.

A With the performances.

Q You don't have the same reason, that is, one of the same reasons, for monitoring local stations; but the other reason of finding out how much music is played and recovering whatever you haven't been paid for, of course, doesn't apply to the networks?

A Well, even in the local, your Honor, the basic purpose of the local survey here, the whole survey system is designed to properly allocate the performance money for distribution among our members. When local -- there may be some other information that comes in which is corollary, as, for instance, whether or not a

station is using music, it doesn't have a license at that time, but that is not really the purpose or design, or doesn't affect the design.

Q Well, you do have a plan of policing programs as I understand it. You have mentioned that you picked up a million and a half dollars last year, and three and a half million, and so forth. Is that just an incidental, a secondary result of the survey, or is that a separate way of handling it?

A It's quite separate, your Honor. The survey itself is designed with the idea in mind -- now we are talking about the sample -- of representing the universal performances in the most scientific way possible.

Q Now I understand.

A And it would be distorted if you put in these other factors.

Now, there might be corollaries. You might pick up performances on an infringing station that does not currently have a license but that is not the initial purpose, and as a matter of fact, there are other tapes taken of infringing stations, of what might be infringing stations, outside the survey, and the auditing results that I referred to yesterday come about in the main as a result of a review ofthe books of a particular station,

not necessarily its performances.

THE COURT: Right.

BY MR. TOPKIS:

Q Well, actually, the audit has nothing to do with the performances of a station, does it, Mr. Marks? You say not necessarily. You are not at all interested in auditing performances of a station which has a blanket license?

A That is right, it would not be a factor in how much the station would have to pay under the agreement. It pays a certain percentage under the agreement less certain deductions.

Q And the question for an audit is, has the station properly reported its income and its deductions and paid you the right percrntage, isn't that right?

A Yes.

MR. HRUSKA: Your Honor, I would like to object at this point. I think the questions throughout yesterday and this morning have been very, very leading. I haven't been objecting to them because we have been dealing primarily with background matter, but I think there probably should come a point in the examination where the questions stop getting so leading and perhaps this is a good point for it.

THE COURT: Well, I don't think it's a question of timing so much as whether there is any serious dispute about the facts Mr. Topkis is trying to bring out. If you don't necessarily agree with the conclusions suggested in his questions, then you are right, and obviously as a general proposition you are right.

Can I hear the last question, please?

(Question read.)

THE COURT: I am afraid I don't understand the question, Mr. Topkis.

MR. TOPKIS: I had thought, your Honor, that your Honor was misunderstanding the witness' testimony from your question about what does an audit do and what does a survey do, and really I just wanted to straighten the record out. The two, as I understand it, have nothing to do with each other.

THE COURT: I now understand that also.

MR. TOPKIS: Fine.

BY MR. TOPKIS:

Q So we have the networks reporting on a census basis, that is, everything, every performance that they make. That comes in to you and you wind up with two lists then. You wind up with a list of the compositions that have been picked up in the survey of local radio and

television stations and you wind up wi th a list of compositions reported by the networks. Do you do anything about verifying those lists which the networks submit to you?

A Yes, there is a week of programs that is reviewed to determine the accuracy of what the network has sent in to us.

Q How often do you do that?

A Each quarter, there are a number of programs in the week that are reviewed. They may be reviewed on a different basis, some by being audio taped, some by means of video tape. Because the way in which the peformance is made by the network may be a factor in the way in which it is credited.

First, by audio tape you can tell whether a performance which has been listed on the tape was actually reported on the program log or whether something reported on the program log was actually on the tape, that is, actually performed.

So that there are those two methods used in verifying performances on the network.

Q What is your purpose in checking the network reports?

A The purpose is to maintain, hopefully maintain,

the highest degree of accuracy that we can in having the networks report accurately, helping the network really to maintain its accuracy.

What we do is we notify the network from time to time about performances that we find on the tape that we don't find on their programs and performances that we find on their programs that we don't find on the tapes when we listen to them, review them.

Q By programs you mean the logs that they submit to you?

A Correct.

BY THE COURT:

Q Wouldn't the tape always control there?

A Pardon me, your Honor?

Q Wouldn't the tape always control?

A Yes, your Honor.

Q If you don't see something on the tape what difference does it make if it is on the log if it wasn't actually performed?

A Well, you see, your Honor, we don't tape all of the -- we don't listen to all of the network performances.

Q I understand that.

A We rely on the logs so that when we tape these --

Q But you indicated that when there was an in- consistency between the tape and the log, you advised the network. I can understand your doing it if you say, "You did not have on your log that you were going to play April Showers but you have actually played it."

A Right.

Q On the other hand, if they show on their log that they are going to play April Showers and you tape that program and you find that they didn't --

A Well, it disturbs our distribution, your Honor. We may find --

Q Wouldn't you know what the true answer was clearly enough simply by --

A Yes, we know and we correct our distribution, but we also tell the network and say, "Look, somebody is putting in a performance that did not take place. There is some reason for you to look into that matter."

Q I see. You mean just a matter of good practice?

A That's is right, trying to maintain the accuracy of those logs.

BY MR. TOPKIS:

Q That is the whole purpose of your verifying, isn't it?

A That is correct.

Q To improve their methodology?

A That is correct.

Q So you have a list of network performances assembled in that fashion. Now, how about network radio Mr. Marks; what do you do about network radio?

A Notwork radio is surveyed on two bases. First, commercial performances on network radio. That is, performances on stations that are commercially sponsored. Those programs which may be commercially sponsored would also have sustaining portions. Our survey on a census basis is of the television network, but those programs that are wholly sustaining in nature are surveyed on a sample basis through the local sample. The reason for that is that we found over the years that where a statoin is not commercially sponsored, there is no accurate way of telling the number of stations that is going over the network. The networks have told us that they aren't sure which stations key into those sustaining programs, so that in order to be able to accurately reflect what kind of a multiplier should be applied we pick that up on the local sample.

Q Going back for just a moment to local radio, Mr. Marks, you spoke of the survey selecting a sample of programs to be taped and analyzed and so on. Are there any local radio stations which receive a disproportionate degree of attention in the survey quite deliberately?

A Well, there are two stations which are referred to as serious music stations, WQXR and WCRB, which are sampled much more heavily. At one point they were censused. There is now a 50 per cent sample of those stations. This is really outside the local survey, local radio design, and the purpose is to encourage the performance of serious or classical music -- these are what might be referred to as serious music stations -- by encouraging the composers and publishers of that kind of music. So that those two stations are included on a different basis than other stations.

THE COURT: Do you not monitor a station like WNCN because all of its music or 95 per cent of it is in the public domain?

THE WITNESS: No, your Honor. If the station pays us a license fee, then it would come -- it would have an opportunity to come into the sample.

THE COURT: And that station presumably does not?

THE WITNESS: If that is --

THE COURT: It is an FM classical station in this area.

THE WITNESS: You are not referring to the WNYC station, which would not, but WNCN most likely would have an opportunity to come into the sample if it pays us a license fee, and I don't know why it wouldn't.

THE COURT: Because perhaps all the music it plays is in the public domain. I don't know. I hadn't thought about it.

THE WITNESS: I am not sure that there are many stations that just have a public domain format.

THE COURT: No, I wouldn't think there are many. But if there are any, it might be WNCN.

MR. TOPKIS: Your Honor, perhaps this is a good point to introduce a document that I have shown to my friends. This is a list. It is called the ASCAP Symphonic Catalog. AX238. I will offer it for identification.

THE COURT: All right.

(Exhibit AX238 was marked for identification.)

xx BY MR. TOPKIS:

Q Do I gather, Mr. Marks, that this document is a document published by ASCAP listing its symphonic catalog.

A That's correct. This is a partial listing speaking as of the date that it was printed, giving the serious catalog with the instrumentation and the duration. It is alphabetical by composer.

THE COURT: Duration meaning the duration --

THE WITNESS: Time duration, your Honor.

THE COURT: How long it takes to play the piece or how long the copyright --

THE WITNESS: How long it takes to play the piece. It is particularly useful for orchestras or chamber groups, depending upon the work involved.

Q Mr. Marks, do I understand that there are listed there not only original copyrighted works, but also a great many copyrighted arrangements of works where the original works are themselves in the public domain?

A That's correct.

MR. TOPKIS: I think, your Honor, that explains why WNCN holds a license, because they perform copyrighted arrangements quite regularly.

Q Is that correct, Mr. Marks?

A If they do hold a license -- I don't know, you know, for a fact that they do -- but I would think not only that they play copyrighted arrangements, but they might very well have occasion to play serious works

of more recent vintage.

THE COURT: We needn't argue about it. As I think about it, they rarely do, and maybe it is a deliberate policy.

MR. TOPKIS: I will offer AX238 for identification.

MR. HUGHES: No objection.

THE COURT: May I take a short look at it, please.

MR. TOPKIS: Sure.

(Exhibit AX238 was received in evidence.)

xx BY MR. TOPKIS:

Q Mr. Marks, does the society survey any performances other than in network and local radio and television?

A Yes. It surveys performances of background music and similar services, like Muzak, Seeburg.

Q How do you know that?

A We receive program information from these services and a sample is drawn by Research Consultants in line with a design laid down by Joel Dean Associates.

Q Research Consultants is that enterprise that you referred to yesterday?

A That's correct.

Q So that is included in the sample, in the survey. Is anything else included in the survey?

A Yes. There is a survey of symphony orchestra concerts licensed by the society and other serious concerts licensed by the society and educational performances at educational institutions.

The symphony and concert survey is on a census basis. Those performances are taken from the printed programs. The survey of educational institutions is on a sample basis.

Q Do you include performances in any other fields in your survey?

A No. Those are the media in which surveys are conducted. There are, of course, other areas from which we receive license fees. For instance, the hotels, bars, grilles, taverns, nightclubs, the area we referred to yesterday as being that of the general licensees.

Initially, when the survey was designed the question, of course, was raised as to the best way of determining performances in that area and a review of that question was made by Dr. Dean and his reaction was that this is an area where it is not economically feasible to conduct a separate survey, given the large

number of licensees and the amounts which come from those licensees. The recommendation was made that the money from this area be paid out over performances -- feature performances in other surveyed media, since the music used in this area is more like feature performance music in other media than it is like nonfeature performance music, cues or themes.

So that that is the way the money from the general licensees is distributed.

Q Would you tell us then how the money in each of the fields is distributed. I take itYou have certain revenues, let us say, from network television?

A That's right. Under the amended final judgment the money is allocated for distribution among the media as it comes in from that media. So that the license fees from local radio are paid out over the performance on local radio, license fees on network radio similarly, and local and network television, with these exceptions:

First of all, the judgment provides that we are permitted to allocate a portion of the money that comes in from local television to performances on network television because that money comes from spot announcements that may be within or around network televi-

sion programs. In other words, the money is paid to the local television station but it may be attributable to network television programing.

Q Does the society in point of fact do that?

A Yes, it does. Also, there are -- there is money that -- when we talk about allocating the money to the media from which it comes, you have to realize that there are other exceptions to that practice. For instance, on the writers' side the society is permitted to allocate --

Q Let's come to that in a minute. That is a whole subject that we will be going into shortly.

THE COURT: I am not quite clear when you say allocating it to the media. I take it you mean allocating it to some pool for that media from which distributions are thereafter made to the members themselves, is that right?

THE WITNESS: That's correct, your Honor. That's correct.

THE COURT: I take it that although the amended final decree, the judgment decree, sets forth these requirements, that there are other factors which control actual distribution which presumably are found somewhere among the governing documents of ASCAP itself, is

that right?

THE WITNESS: That's right, your Honor. But even here, you know, the decree and the associated documents, for instance, provides that the society may distribute to performances of serious music money considerably in excess of the amount that is collected from that media. So that is money that has to come from these other sources, and it does. That was what I had reference to.

THE COURT: I see. I am trying to get the overall structure now. You must understand that on this point I really have had no information whatsoever up to now, and whatever its relevance, at least I want to try and understand it.

I merely want to be sure I am right, as I understand now that I am, that there are essentially two sources of legal authority governing the distribution of funds received by ASCAP. One is the decree and the other are its own rules and regulations, in whatever form those are found, is that right?

THE WITNESS: Yes, your Honor. There are actually formulas that --

THE COURT: I have heard of the four funds method of distribution, for example.

THE WITNESS: Right.

THE COURT: But I don't know, and now is as good a time as any, and your lawyer says you can tell me, in what form are these methods, regulations, actually codified?

THE WITNESS: They are codified in formulas, in rules that are associated with the decree. They actually refer to the -- the decree refers to rules that are attached to it and that from time time have been amended. When those rules are amended the decree itself is amended. It has been amended several times since 1960.

THE COURT: All right. Thank you.

BY MR. TOPKIS:

Q Do I understand that once a work has turned up in the survey in any particular medium its performance is then given a certain weight?

A Well, remember we said that there are different sources for determining what performances are surveyed, either the tapes which become programs, the program logs which come from the networks, the programs that come from the background music services and sample. These are formalized on program sheets. Those sheets are coded. Each composition has a distinctive code number.

And they are weighted in line with the weighting formula, and this weighting formula is something which -- a formula which has been determined in accordance with the weighting rules, the weighting rules themselves being a part of the amended final judgment.

The formula sets out the relative value of performance because these performances we have been talking about will come in various forms. They will be feature performances, they will be background music, themes, bridges, jingles, cues. Each of these types of performances is referred to in the weighting formula and that weighting formula assigns relative values to those types of performances.

Q So that a feature performance willnot receive the same weight as a jingle performance or as a background performance, is that right?

A That's correct.

Q Just by way of suggesting the variety, I will show you a document we have had marked as 233 for identification, Mr. Marks, and ask you if you can tell us what that is.

A This is a fact sheet for a particular quarter of performances. Its heading is first quarter 1973 performances. This will be found in what is referred to as the daily detail. It is an IBM run of all of the performances in a particular quarter listed alphabetically by title of performance and code number and indicating the daily performance by performance, so that a member can, if he wants to know how his performances have been computed, look to this daily detail, find his work, and see how the performances have been computed.

This sheet will give him the multipliers and the credit symbols for the different types of performances we just spoke about that were applicable in that particular quarter.

MR. TOPKIS: Then I will offer 233 for identification just as a guide, if I may.

MR. HRUSKA: I object, your Honor, simply

because I don't understand so much of this document.

THE COURT: I understand why that is a motive for objecting, but I am not sure --

MR. HRUSKA: I would for that reason place the objection on grounds of irrelevance.

THE COURT: I don't think it is irrelevant. I am not sure I understand it thoroughly either. But I do understand now that Mr. Topkis is putting in this proof as intended to deal with the question of feasibility insofar as it illustrates the complexity of the present situation and what would have to be done by a replacement system, and I think it cannot be denied that such factors are relevant, however the effect of the proof that he puts in may or may not turn out to be.

So I will receive the exhibit in the hope that you and I will both get to understand it better.

MR. TOPKIS: I am only going to focus on a portion of it, your Honor, and perhaps that will minimize the necessary exploration.

xxx (Exhibit AX233 was received in evidence.)

MR. TOPKIS: May I just hand your Honor a copy of it, so that you can follow it?

THE COURT: Yes.

Q Looking at the right under "credit symbols," Mr .Marks, I see at the top feature 100 per cent.

That means, I take it, that your base credit is a feature performance and that gets 100 per cent, is that right?

A That's right. It gets the full value, so to speak.

Q Running right down, we see that then the jingles get 1 per cent of the value that a feature performance would get.

A That's correct.

Q What is a jingle, sir, as the term is used here?

A A jingle is a work that is written for -- directly for a commercial announcement, or it may be a work that is taken out of the repertory but which has been changed for use with a commercial announcement. In other words, suppose they take a popular song and change the lyric to use it with a commercial announcement. Then it gets jingle credit or one per cent.

If it is a song which has been taken out of the repertory but unchanged, then it is credited in the same way a theme is credited, at 10 per cent, or higher if it is qualified work.

Q We will come to qualified work in a minute.

Right under 100 per cent, I see another kind of feature gets a 25 per cent credit. What is that?

A That is a feature performance on a network program which appears, I believe, three or more times weekly. We refer to it as a multiple-program -- that is the Mult-- where the work is written or published by someone who is associated with the program, works for or is a producer of the program or employee or the music conductor, etc.

Then the credit on that program, the credit for performance on that program is reduced, because of his opportunity to foster performances on the program.

Q Coming down under "them" we see four categories of them getting 50 per cent, 37.5, 25 per cent and 10 per cent.

Could you explain that to us?

A Yes, probably from the bottom up. The 17 symbol is for a non-qualified theme. The 13, 12 and 11 symbols are for what is referred to as qualified themes.

Now, a qualified work, and it may be qualified as background or theme, is a work which has received a certain history of feature performances in the survey over the period of its life and has also maintained a history of feature performances over the last five years. It has

to have a certain average of credits over the last five years, plus a certain total number of credits in order to achieve status as a qualifying work.

If it is a qualifying work and it does receive this non-feature type of performance it is eligible to get this increased credit because of its features of recognition.

THE COURT: What explains the range between 25 and 50 per cent?

THE WITNESS: Varying credit that you have to achieve. You have to have 20,000 feature credits.

THE COURT: Basically it depends on frequency of performance, does it?

THE WITNESS: Yes, your Honor, and the credits that you get for those performances.

Q Just to hurry things along, Mr. Marks, are there similar demarcations as to the category that you will see on the right marked "theme (TV musical/variety program on camera)"?

A Correct. That is a different kind of theme. It is a theme that is used on a TV musical or variety program, and the performance of the theme is viewable on camera, it is eligible for that different credit, increased credit.

Q The next category,"background to commercial," what does that refer to?

A That relates to what I mentioned before, a work taken from the repertory for use with the commercial where no change has been made in the work, they use the work as is were the commercial. It thengets theme credit and is eligible for this increased credit as a background, as a qualified theme.

Q Sothat if In My Merry Oldsmobile were used without any change in the lyric, it would receive this treatment?

A That's cor rect.

Q That is, as an oldsmobile commercial. But if Cole Porter's It's Delovely were modified to become "It's DeSoto" commercial, then it would be treated as a commercial and get the one percent credit.

A You are giving away your age, but yes, that's correct.

Q That is a lot. So far as background to commercial, so far as that category is concerned, we see different weights ranging from 50 per cent down to 10 per cent. What is the explanation of that in broad terms?

A Those are the vary ing rates of qualification.

The 10 per cent is a non-qualified work that hasn't been changed and the 61 or 50 per cent is a fully-qualified work.

Q We have already discussed jingles and now we see three different background terms, background 50 per cent, background 20 per cent, background for each three minutes 27.5 per cent. What does that mean?

A Those are non-qualified background as opposed to the qualified background we were speaking about. The non-qualified background is -- you know the 99 symbol is -- refers to background which is credited on a time duration basis. So that three minutes of that background music will get 27.5 per cent of what a feature performance would get.

Q And if there were nine minutes of it, it would get almost as much as a feature performance?

A That's correct.

THE COURT: I am not clear on this business of unqualified, since when we were dealing in Box B here, which is called background to commercial, for example, you indicated that the item at the bottom of the box, Number 67, 10 per cent, referred to unqualified items.

Now we go onto another category that we just

discussed, which are also described as background items, and which I understood you to say were unqualified items, and the credits for them jump 27.5, 20 and 50 per cent, which is not far different from the qualified items that you referred to in background to commercial.

Can you explain to me --

THE WITNESS: Yes, your Honor, and I think there is a difficulty here in the language. The background -- when we speak of background to commercial it is descriptive in the sense that when you hear a commercial you will hear music sometimes played behind the script, the text, but actually that is credited as a theme, it is credited as a theme music. It could say them to commercial and probably be more accurate there.

THE COURT: I see.

THE WITNESS: The unqualified, non-qualified rate for a theme is 10 per cent, and it is not related to time duration. It is 10 per cent for the particular use.

When we come down to background, there that is background -- that is usually cues and bridges. If you watch a situation comedy or a feature film, the music you hear going on while the action takes place is called background, and that is the way it is used in this sense.

THE COURT: I see.

THE WITNESS: Here it is paid on a time duration basis. The time is aggregated for a particular member and he is paid on the basis of 27.5 per cent of what a feature performance would get for each three minutes of that music.

THE COURT: Does the "for each three minutes" apply also to the 50 and 20 per cent or just to the 27.5 per cent?

T E WITNESS: Just to the 27.5 per cent.

BY THE COURT:

Q When does the 50 per cent item apply?

A The 50 per cent or the 31 symbol refers to background music used as background in the manner I have described it which is qualified, has met t his test of feature performances, so that there is some recognition factor, but the work may be used in a qualified -- in a background manner. If it is, then it gets this 50 per cent credit.

Q Well, it seems possible that something in Category 31 might only get 50 per cent no matter how long it was played, whereas something in Category 99 might get, as Mr. Topkis was indicating, 82 per cent or whatever it is if it were played for nine minutes, or if it were played for 15 minutes it could even get over 100 per cent . Am I correct in coming to that conclusion?

A Yes, in this sense, your Honor, that someone may have written and customarily will have written background music that takes up a good part of a feature film or television program, and he may receive for that on a time basis more than what a single performance gets of a single qualified work used as background.

But here again we are talking about works, qualifying works are usually songs, they may be serious works as well, that have some recognition value to the

public.

Q But you are both as to Item 31 and 99, aren't you?

A I am not following you.

Q You said you were talking here about items which have some recognition value.

A No, 99 items would not -- the public would hear it. I am talking about recognizing the song as being something familiar because it has been a feature song.

Q Well, I don't seem to be able to get the information that I am looking for which is not your fault. Maybe I haven't made myself clear. At least as 31, 36, and 99 are shown here, and as we have had the discussion, it sounds to me they are all the same kind of use.

A May I use an example, your Honor?

Q And one seems to get paid at a better rate than another. I don't understand why.

A Right. Let me give an example, your Honor. Let's say you have got a situation comedy, where they are having a tea party, and as the hostess brings in the tea, they play Tea for Two. Now they could play music that is written specifically for that episode. They have that option. They can do it either way. But for some reason --

and probably for very good reason -- the director or whoever makes the decision prefers to use Tea for Two for the recognition factor that the audience is going to recognize it, and it is going to futher the story line perhaps.

The performance of Tea for T wo would be paid on this 31 symbol as a 50 per cent performance regardless of the time duration because it is a qualified work, it has a history of featured performances.

If they didn't play that, they played just some jusic that was written specifically for the episode, the packager had assigned somebody to write that music, as is very often the case, then that would be paid for on a time duration basis at 27.5 per cent for three minutes.

Q Well, I understand that, the distinction between those two examples, but are you implying that 99 applies only to music that is written for the program?

A No, I am saying that it applies only to music that is not qualified in either the sense of the background, the 31 symbol which is a history of feature performances, or the 36 symbol which says that the provision for t' at is that if it has -- that is the one between the 31 and the 99 -- that if this work has been commercially recorded, and has had a certain number of performances in the local radio survey, then it qualifies for a 20 per cent

credit.

In other words it assigns added values for the wider use of the work.

Q I don't want to take any more time at it. I think the important thing for me is to realize that you have these various computations to make, and while it may be interesting to me to understand why even the Court or the members have decided to allot the credit that they have, you are not concerned with the particular weights of the system.

MR. TOPKIS: No, your Honor, I just wanted you to foresee the system exactly so.

THE COURT: Incidentally, is there a definition -- catalog of definitions of these various factors somewhere?

THE WITNESS: Yes, your Honor. A weighting formula.

MR. TOPKIS: Your Honor, I can give you what is attached to the stipulation of fact here.

THE COURT: If it is attached to the stipulation, then I have it already.

MR. TOPKIS: The reason I asked Mr. Marks to explain it to you is that it defies my comprehension and it occurred to me --

MR. HRUSKA: And everybody else's.

MR. TOPKIS: -- that others might have difficulty with it.

I can say, your Honor, just for the record, that this order that I am referring to is Exhibit 11 to the stipulation of facts which was previously received in evidence as your Honor's Exhibit 2.

THE COURT: All right, thank you.

BY MR. TOPKIS:

Q Just one final question, Mr. Marks. Relating to this document AX233 for identification, we see in the middle of it the term "feature multiplier." Do you see that?

A Yes, I do.

Q Would you tell the Court what that is?

A Well, you will recall when we were discussing the way in which the various media were surveyed, I said that we regarded general licensees, the income from that area is distributed over feature performances in the other surveyed media. This feature multiplier represents the multiplier that will accomplish that distribution. It is applied to the feature performances to allocate that income from the general licensees.

Q And up above there is the term "strata multiplier,"

Is that too a kind of multiplier which is applied to surveyed performances?

A That is correct. When a performance is weighted in line with the credit symbols that we have looked at over on the right, the results of that weighting will produce what we refer to as use credits. One of the purposes of the system design is to distribute -- remember I said that we are trying to allocate the money from various licensees so that it is paid out for performances by those licensees?

Q You mean groups of licensees or classes of licensees or individual licensees?

A No, groups of licensees, the ones that we referred to when we were talking about the survey, local radio, network radio, local television, network television, background music, etc.

The multipliers that are listed under the heading "strata multiplier," are the multipliers which blow up the use credits so that the total credits for the particular media will represent the dollars which come in from that media. These might be referred to as the blow-up multipliers, so that you end up with the kind of total credits that will distribute that amount of dollars to that medica.

BY THE COURT:

Q Does that mean, for example, that in this

quarter, the TV Network being 328, and local radio being 37, that TV network took in approximately ten times as much as local radio?

A No, your Honor. The reason that you can't make that comparison is that the -- don't forget these multipliers are being applied to use credits, and the use credits will depend upon how many uses you have in the particular media and what their relative values are on this credit symbol chart.

Q I understand that is true for the recipient, but I thought you said that these factors 37 and 61, 11, 328, refer to in effect, the moneys earned by the performance of music on these various strata?

A No, that is a factor in the determination of what that multiplier will be but let me see if I can give you an illustration.

Q It is not the sole factor?

a It is not the sole factor. It is a factor. Let's say you end up with ten use credits in a particular media. That is hypothetical. There are going to be many more in each media, and you want to distribute 100 performance credits from that media because 100 performance credits will represent the value of the license

fees from that media.

You would multiply -- your strata multiplier would be 10.

THE COURT: I think I understand.

BY MR. TOPKIS:

Q Do I gather then, Mr. Marks, when the weighting rules and the weighting formulae and the multipliers are applied, you wind up with a certain number of performance credits attributable to each of the principal sources of revenue of the Society, local radio, local television, network television, background music, and so forth?

A That is correct. After all these multipliers have been applied.

Q Do I gather then that the moneys received from these various groups or classes of licensees are distributed in accordance with the performance credits applicable to performances by those classes or groups of licensees?

A That is correct, with the exceptions that I have started to mention before in terms of awards and the initial money that is paid out to performances of serious music.

Q Within any particular field, let us say network television, there is a writer's share and a publisher's

share, right?

A That is correct.

Q They are split down the middle?

A No, the credits which result from the application of the weight ed formula which assigns relative values and the multipliers which are designed to allocate the revenue by media, produce performance credits for each individual work. That is the end result . X work gets so many performance credits in that quarter.

The writer or writers of the work, if it is one writer he will get all the performance credits for that work. If there are two, they may divide them 50-50 or 75-25. If there are three, one-third each. He will get a share of credits for the work. The publishers will also get the credits for that work, so that when you have -- the end result of a distribution is to have performance credits for each work that has appeared in the survey and those credits allocated by member.

THE COURT: Then you pay X cents or dollars per performance credit?

THE WITNESS: Well, then there are distribution distribution formulas, your Honor, and the formulas differ for writers and publishers, wherein those credits are

translated into distribution dollars.

Q Those are the so-called writer's rules and publisher's rules?

A Writer's distribution formula and publisher's distribution formula.

Q Do I understand those are subject to approval by the Court administering the amended final judgment?

A Yes, those are adopted -- I think the formulas may be part of the judgment. They are adopted in accordance with the judgment, and if changed, changed with the consent of the parties.

THE COURT: That means with the government's consent when you say the parties?

THE WITNESS: Yes, your Honor.

THE COURT: But internally how do you go about changing these rules? Perhaps it has nothing to do with this case but what is the mechanism of doing it?

THE WITNESS: Your Honor, customarily if any of the -- if there are changes made they will be discussed by the survey and distribution committee of the board of directors. There are advisory committees to the president of the society, two advisory committees -- actually, three. There is a writers advisory committee on the East Coast, one on the West Coast, and a publishers advisory committee made up of nonmembers of the board who may discuss or generate ideas for changes in the formula.

THE COURT: Then are the changes then enacted by the board or by the membership or both?

THE WITNESS: They are enacted by the board. They are commented upon by the distribution advisers. They may be recommended by the distribution advisers, passed by the board. If it is a change that requires a change in the judgment, then there is a notice given to the membership and a hearing before the District Court, which is before Judge Ryan.

If it is a change which doesn't require changing the judgment, then there is a notice given to the membership that this change will take place at a certain point in time. Notice is also given to the Court that a change is taking place.

MR. TOPKIS: Just so that it may be clear, your Honor, I am sure that your Honor is aware that there is something called the amended final judgment of 1950 which deals with the rate-fixing proceedings and so forth. What we are talking about here is the 1960 order, as modified, which is a separate document although in the same action, and that it is which governs survey, distribution, and so forth.

THE COURT: I see. All right. Thank you.

BY MR. TOPKIS:

Q Going to the simpler one first, Mr. Marks, how

do the publishers distribute their share?

A Well, the publishers' distribution is made on what is referred to as a current performance basis. The first quarter of the payment year is the July distribution. In the July distribution we have computed credits from the various media for publishers for the performance period October-November-December of the prior year. That's how long it takes for the system to count, survey and count the performances and allocate the appropriate multipliers and come up with the performance credits.

So in July of 1973, for example, we will be reporting to the publisher members for performances only June-December of '72.

The revenue distributable to the publishers in that quarter is divided by the total performance credits for all publishers and a tentative credit value is arrived at. Each member's credits are multiplied by that tentative credit value and that is the amount he receives in that distribution. I refer to it as a tentative credit value because in the subsequent quarter in October we will take the performances for two quarters in the performance year, October-November-December of '72, January-February-March of '73, take the distributable revenue to publishers for two quarters and come up with

a new credit value, pay the member based on what this new credit value is, correcting for any underpayment or overpayment based on the original payment in June.

We do this aggregation for four quarters, and arrive at a final credit value in April of the following year when we have surveyed the four performance quarters.

Now, we do that for this reason: The licensees pay us at varying rates during the year, and we want to avoid having a member gain or lose because he may have more credits in a quarter or fewer credits in a quarter where the licensee has paid us more or less. So what I am saying is that we average the credit value in a sense over the four quarters and that's how the publishers pay.

We ought to point out initially that in determining what the distributable revenue is we divided the money in half so that half of it that is available for distribution is payable to the writers and half to the publishers.

THE COURT: Do I understand that the society regularly pays out all of its income less expenses?

THE WITNESS: Yes, except for money which is coming from foreign sources, which is distributed

twice a year and may be held while we are processing the foreign statements; and also money that is going to foreign performing rights socities is paid out once a year. Except for that money.

BY MR. TOPKIS:

Q Right. But by the end of the year the objective is, I gather in order to minimize taxes, to get out all the money?

A Yes, except for that money which has not -- could not be distributed because -- the foreign money is what I am referring to.

Q Right. All right. So much then for the publishers' share.

Could you tell us now, please, how the writers' share is distributed?

A The writers, unlike the publishers, have an option of payments. First, they may be paid on a current-performance basis, or they may be paid on the basis that your Honor has referred to, the four-fund basis.

In determining how much money is applicable to each basis of payment we do the following:

Each writer on a current-performance basis is paid on four quarters of performances at one time. You

remember I said that in July we'd be paying publishers on the basis of performances in October, November and December of '72? In July we were paying writers on the most recent quarter that they will receive a statement for,which will be the preceding quarter, July, August and September of '72, and we aggregate the most recent and the three preceding quarters, July, August, September; April, May and June; January, February, March; October, November, December, going backwards.

Q Do I gather then -- forgive my interrupting -- that the publishers you are paying six months later and the writers you are paying nine months later?

A That is correct. The most recent quarter that is counted into the computation is nine months early.

Q Just so that again the record may be clear, when you are paying six months or nine months later, are you paying the revenues that you received six months or nine months ago, or are you paying out the revenues that you are receiving or have just received at the time of distribution?

A You are paying out the revenues that you have aggregated since the previous distribution. Paying out on current revenue, not on revenue nine months to go or six months to go.

Q Right. So you are paying current revenues on the basis of performances six or nine months ago?

A In the cases we are referring to, that is right. You are dividing up the total fund that is currently available for distribution on the basis of these formulas which may take into consideration performances during the prior period.

Q You were telling us how the writers who are on a current-performance basis are compensated.

A Yes, I was telling you how you divide the writer-distributable money into these two funds: the current performance for current-performance writers and four-fund writers.

So that we take these four quarters of credits and again we divide the distributable revenue in that particular quarter by the four quarters of credits for all writers, not just the current-performance writers. I think this is an important point because I think in discussing Dr. Fisher's testimony I think that there may be a misunderstanding of that, but what we do is take the four quarters of credits for all writers, those writers who are on a current-performance basis and those writers who are on a four-fund basis, and we divide the revenue distributable to all writers in that particular quarter by

the credits that have been received by all writers and come up with a per-credit value.

That per-credit value is the current-performance credit value for that quarter so that someone who is on a current-performance basis of payment, we multiply his credits by the per-credit value and that is what he is paid in that quarter.

Q That is how a man who is on a current-performance basis is compensated?

A That is right.

MR. TOPKIS: Your Honor, before we go to the four-fund, which is a rather complex subject -- as Al Jolson used to say, you ain't heard nothing yet -- could we take our morning break?

THE COURT: I think we better if it is more complex.

All right, we'll take a short recess.

(Recess.)

BY MR. TOPKIS:

Q Mr. Marks, before we come to the four-fund question there was one subject we touched on before that I wanted to quantify, if you would.

You told us, as I remember, that a portion of the revenues received from local television are paid out not in accordance with performances on local television but in accordance with performances on network television. Do you remember that testimony?

A Yes, I do.

Q Could you tell us what percentage of the revenues which the society receives from local television is paid out in accordance with performances on network television?

A I think it is in the neighborhood of about 35 per cent.

Q Who makes the determination as to what percentage is so paid out?

A Joel Dean reviews this question in line with the judgment, which, as I said earlier, provides for this adjustment of spot revenue that goes to the local stations but is attributable to network programs. Dean makes a review of what this amount might come to and he prescribes the percentage allocation.

THE COURT: This applies only to radio, is that right?

MR. TOPKIS: No, television.

THE COURT: Only to television or both?

Q Which is it, Mr. Marks?

A I think it is in television that it is a major factor. Network radio these days is a very small shadow of what it has been. It's only a major factor in network and in local television.

Q Mr. Marks, we were about to go into the writers who elect to be paid on the so-called four-fund system. Before we do that, can you tell us how many writers are on the current performance basis and how many are on the four-fund basis at the present time?

A I think the current figure is something over 9000 writers on the four-fund basis and something over 6000 writers on the current-performance basis. But most of the -- the money which goes out to writers on a current basis is about 20 per cent. Of course, that fluctuates with the writers whochange from current to four-fund. But those are the numbers.

Q Right now then about 20 per cent of the writers' share of moneys is being distributed on a current-performance basis?

A Right.

Q Now, would you tell us how this four-fund system works?

A Well, you remember I said that we start with the writer-distributable revenue, which is half the distributable revenue in a particular quarter. We first determine what the current performance value of a credit is by taking all the credits for the four quarters that are being used as the basis of payment, and that is for all members, whether they are on a current basis or four-fund, and then taking all the distributable revenue for all writer members and coming up with the per-credit value, multiply the credits to those members who are on a current-performance basis of payment, multiply their credits times the per-credit value, and that represents what is being paid out to the current-performance fund, the current-performance writers in that quarter.

The remaining money goes into the four funds and is paid out on a four-fund basis. The four funds are constructed in this manner: The first fund is 20 per cent of that remaining portion, andthat is referred to as the current-performance fund as opposed to current-performance option. This is the current-performance fund as part of the four-fund system.

Q So that one of the four funds is a current-performance fund?

A That's right. And a member gets paid in that fund according to what his credits have been for those four quarters that we referred to.

Q His current performances?

A That's right. And all the members who are being paid in that fund, their credits are divided into the dollars allocated to that fund and we come up with a per-credit value and the member gets his credits multiplied by the per-credit value. That is what he is paid in that fund.

Now, the second fund is what is referred to as the average-performance fund. The average-performance fund represents 40 per cent of that remaining portion.

Q That is, 40 per cent of the 100 per cent allocable to the four funds?

A Correct. A member is computed in that fund, his standing is computed, on the basis of his five-year average of performances, that is, his performances for the five preceding survey years are aggregated, divided by five and divided again by 40. The result will give him a certain number of points. All the points for all the members who are in this fund are then divided

into the revenue allocable in this fund to come up at a per-point value, and he then receives his points times the per-point value, with this very important difference: the top writers of the society have voluntarily agreed to require more points or credits to receive a dollar of distribution than those lower down, and this has an effect on this fund, it also has an effect on the current performance option.

In the amended final judgment there is a provision that the top 100 writers, if they agree by a vote taken, and in that vote a majority, both in terms of the number of writers and in their performance weighted by performance credits, would have to agree, if they agree they are restricted from receiving money on a 100-per-cent-performance-credit basis.

In the average-performance fund those top 100 writers who are in that fund, instead of having their credits divided by 40, they are on a range of classifications which requires many more credits to earn a dollar than it does for those people lower down.

The effect of this is that money which would otherwise go to these top 100 writers flows down to the writers below, and this flow down of money at this point represents something in the neighborhood of a million

dollars at this point.

Now, the effect of this --

Q Over a year or --

A Over a year.

The effect of this, as I say, is felt in the average-performance fund, and writers who are on a current-performance basis, that is, who have elected the current-performance option, who have reached a point in their current-performance credits which is equal to the credit of the writer in the four-fund who is the lowest writer affected by this flow down who is contributing, somebody gets up to that point, and I think it is about 50,000 credits now, the credits above that point are paid to him, not on a current-performance basis, but on a four-fund basis.

Q I might say I see, but it wouldn't be accurate, so I will just ask tou to continue with your discussion of the four funds.

A The average-performance fund I said was a 40-per-cent fund.

The next fund is a recognized works-performance fund. In this fund the members' recognized-works-performance credits are averaged, aggregated and divided in the same manner as his average-performance

credits. This a 20-per-cent fund.

Now, a recognized-works-performance credit is a credit which a member has received for a performance of work that has been in the survey for more than a year. The credits for -- in other words, the credits for his works which are in the second year of performance or longer are counted into this fund. Also, however, he may get some credits in the first year of performance, if he meets a test, if his works meet some kind of a test: Taking the new works in the society's survey in the last five years and taking the top 50, if your work gets the same credit or more than these top 50 in the last five years you may get recognized-works credits above that even in the first year of performance.

So that this fund works in the same way as the average-performance fund I have just described, but it deals with recognized-works-performance credits.

Q Only?

A Only.

Q So that only the performances of so-called recognized works share in this recognized-works-performande fund, is that right?

A That's correct.

Q And that is a 20-pe.-cent fund, did you say?

A Right.

Q That is three funds. What is the fourth fund?

A The fourth fund is the continuity of membership, sometimes referred to as the seniority fund, and this fund is a function of two factors. One is the members' annual ratings as computed in the same manner that we discussed with regard to the average-performance fund and his quarters of membership up to a certain number of quarters. I think it is 168. I am not sure, don't recall. But it is a function of those two factors. So that if a member doesn't have any credits, even though he has a great many quarters of membership, if he doesn't have performances he is not going to realize anything in this fund. It is those two factors that are involved in this fund. That is a 20-per-cent fund.

Q Did I understand you just now to say that if he has a lot of seniority but no performances he gets nothing out of this fund?

A That's right.

Q And if he has a lot of performances and no seniority, he also doesn't do too well?

A Well, it is impossible for a member to have no seniority because he has been in at least a quarter or so, he is gaining seniority, but he is going to lose the other part of that factor, that's right, those two factors.

Q And this is a 20 per cent fund?

A That's correct.

Q So there are the four funds, is that right?

A That's right.

Q And --

A I think one of the points that is easily misunderstood here and important to realize is that somebody who is on a current performance basis of payment doesn't have his amount of distribution affected by what the people on the four funds basis receive because the credit for the current performance basis payment is pro rata all performances of all writer members, and that money comes off the top of the writer distributal revenue before the remainder

is divided int othe four funds.

THE COURT: How often can you exercise an option to change from one to the other, or can you?

THE WITNESS: Yes, you can, your Honor. You make an initial choce as a new member. You can make it coming initially or you can come in on a current basis and then switch to the four funds after a certain number of years and use the credits that you have gotten in the first three or four years in the four funds, and later on you can change, but then you -- if you change too often there is a penalty in terms of how long you have to wait to come back, and all these changes have to be prospective in terms of performances.

THE COURT: Of course.

Q When you come into the Society, Mr. Marks, are you given information as to how in your particular situation the operation of the current performance or the four fund system would affect you?

A Yes. You are given a description of the option in shorthand plus the detail material. Of course, there are a number of questions, people who can answer those questions. A member wants to know in his particular instance what the effect may be.

In fact, for new members this combination option of coming in on a current basis and being able to change subsequently is one that is most interesting to them. They can make the determination at a subsequent time.

Q You have read Professor Fisher's testimony in this case, is that right?

A Yes, I have.

Q I am going to ask you some questions about it, if I may.

MR. HRUSKA: Could you give us a page reference?

MR. TOPKIS: Of course I will.

Q Professor Fisher was asked at Page 1760 of his testimony about ASCAP's power to exclude competing performing rights societies and he said in his answer at Page 1761 -- and here I am referring to Line 11 of Page 1761, he said:

"Some aspects of ASCAP's distribution system make it difficult or a tleast impede the formation of a different society."

He went on to say that "One aspect of the distribution system which so impeded was that the four funds system" -- he said, "rewards" -- and this is at Line 20 -- "continuity of membership in ASCAP. This means" -- he said, "that ASCAP member thinking of leaving ASCAP to join some

potential new society that might otherwise want to form is going to have to bear in mind the fact that if the society failes, the new one, and he comes back to ASCAP he is going to lose a certain amount of money."

That is what Professor Fisher said.

My question to you is, do you agree with that statement?

A Well, you remember I mentioned that there may have been some misunderstanding of the way in which these funds are computed.

Someone who leaves the society may elect to continue receiving payment from the society by leaving his works in the society, if the works are written by a member who remains or publisher who remains in the society, and receive payment on a current performance basis.

Somebody returning to the society may elect to receive money on a current performance basis. Someone who is on an upward curve of performances, that is, where his performances are increasing each year, his credits are increasing each year, would receive very probably more money in distribution than he would receive on the four fund basis, where he is averaging his credits over a five-year period, he is carrying along some lower years.

So that if you are talking about the more successful writer who is on an upward graph that continuity of membership fear that Dr. Fisher talks about is not going to be a factor. He may very well find that on a current performance basis he is getting more than he is getting on a four fund basis.

THE COURT: May I ask whether Dr. Fisher is correct in the assumption he made, whichis that if you do leave ASCAP and you do return you lose the continuity of membership that you had built up before that time. If that is not true, then his statement, his conclusion, is based on an incorrect assumption.

TTHE WITNESS: I think therewere two assumptions there, your Honor. As far as leaving and coming back, you do not pick up the continuity of membership quarters that you had before. But his second assumption was that you might then lose money.

THE COURT: Yes, I understand that you talked about that second assumption or at least pointed out the reasons why his conclusion would not necessarily be true.

But I wanted to know whether at least his assumption that you didn't pick up your continuing membership, or whatever the phrase is, if you left and returned was

correct, and I understand from you that that assumption is correct.

THE WITNESS: That's correct, your Honor, and that factor would be a factor with someone who may be on a downward curve and who is receiving more money from the four fund system than he would receive on a current performance basis.

You will remember that the current performance money comes off first, so that the people who remain on the four funds are essentially dividing that fund up amongst themselves, and here again whether or not they would be better off or worse off depends upon what they would get in relation to what they would get on a current performance basis.

Q So that the existence of the four fund option operates to deter a failing writer, a writer over the hill, one on the downgrade, from leaving ASCAP, is that correct?

MR. HRUSKA: I object, your Honor. That is a very leading question.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: It leads, but of course it leads in your direction, it seems to me, Mr. Hruska, as far as it

goes. I think that that is what the witness has already said.

MR. HRUSKA: My problem, your Honor, was with the point as far as it goes, because I think --

THE COURT: I understand. I understand Mr. Marks' testimony on this point to add up at this point as follows, and Mr. Marks, you let me know if it is right.

That you disagree with Dr. Fisher in his view that as a general proposition the effect of the four funds system, and particularly its seniority fund, would be to discourage people from leaving and so on, and therefore concluding the formation of a theoretical competitor, because at least to those who are doing normally or certainly as to those who are on an up curve, they would be better off to be paid on a current performance basis anyway, and in that circumstance, of course, the makeup of the four funds would be irrelevant; that on the other hand for people who are on a downgrade, they might be better off to be members of the four funds setup, that is, be paid on the four fund basis, and to the extent that they are paid on that basis and to the extent that seniority is involved there, which is 20 per cent, it might have some influence.

THE WITNESS: That is correct, your Honor.

MR. HRUSKA: Or writers on a plateau, your Honor.

THE COURT: I am not quite sure whether you expressed yourself about a writer on a plateau.

MR. HRUSKA: Cole Porter, for example, during his heady years.

THE COURT: You will have your crack.

Did you express yourself about writers on a plateau? It sounds like the name for a good novel.

THE WITNESS: No, your Honor. We were talking about those on an upgrade and a downgrade. I think that writers generally speaking don't find themselves on plateaus too often because you are always adding years and dropping years.

THE COURT: Let me ask you --

THE WITNESS: But if you did have someone with a constant level of credit that may very well depend upon what his quarters of membership were as to whether or not he would do better in one or the other. I think there it would depend upon the individual.

THE COURT: You mentioned the top 100 being able to waive some of the funds that might come to them. That is as part of the current performance fund, is it?

THE WITNESS: What the top 100 waive is the right to receive payment on a current performance basis.

THE COURT: But that is a factor, is it, which is part of the four funds structure?

THE WITNESS: It is part of the four funds structure.

THE COURT: When you say the top 100, are you talking of the top 100 who sign up for four funds or the top 100 members on any particular basis?

THE WITNESS: Well, it is the top 100 writers who have the right to vote. It may be on any basis.

THE COURT: What I am trying to find out --

THE WITNESS: It is the most credits.

THE COUPT: Is it generally true that members of the top 100 choose to be paid on a four funds basis or is there no pattern observable which would permit you to answer that question?

THE WITNESS: I can answer it on this basis, your Honor.

If a new writer comes in he may choose to be paid on a current performance basis and have a very high degree of success in his first year or so, and become one of the top 100 writers. That has and does happen.

Since he is on the current performance basis he is paid on that basis up to a certain level of credits and above that level of credits he is paid on a four fund basis.

Actually, there is also a provision in there which gives him an option of going onto the four funds.

THE COURT: What I am trying to find out is this, since we have raised the question of Dr. Fisher's opinion of whether the seniority part of the four funds setup constitutes a drag. I am trying to find out whether there are facts available to show that the powerful writers, which is as good a way to describe it, I should assume the top 100 - as anybody -- do choose the four funds method

Tk 5A

It would seem to me that it would be of some significance or lets put it this way, that Dr. Fisher's view would be more meaningful if the top 100 generally were paid on a four funds method than if the evidence really shows that only 10 per cent of them were.

THE WITNESS: Well, your Honor, there is some historical factors here which I think enter into it. The writers, the older writer members of the society, generally speaking, are on the four fund basis, and those older writer members of the society who are in the top 100 are on the four fund basis, but newer members of the society, who are now in the top 100, the Neal Diamonds -- he is on a current performance basis, for example, and more and more you will find that the newer members of the society are on a current basis, whether they are in the top 100 or not.

THE COURT: That probably expresses the fact that the cost of living has gone up for everybody and they just have to have the top dollar right away.

THE WITNESS: Well, there may be a number of factors, your Honor.

THE COURT: Thank you.

Q Let me ask you about another statement which

Dr. Fisher made, Mr. Marks. At Page 1762, Line 10, Professor Fisher said, and I quote, "Since the pie which is divided up in the ASCAP distribution system is a pie consisting of payments made in the current year, that means that in each year writers popular in that year are subsidizing writers who have been popular in previous years but whose popularity has declined."

Is that statement accurate?

A Not in the context, remember, that I am describing as the writer's distribution formula. That is, where the current performance money is pro rata to all the credits. that money is not reduced by what goes into the four funds. So someone who has a good current year will get all the money that is coming to him on a current performance basis for that year. He isnot supporting anyone else with the exception of the fact that if he is in the top 100, he is going to go into that flow-down situation.

THE COURT: That is at least in theory a volume proposition, I understand.

THE WITNESS: That is right, on a vote every three years on request, and there have been several votes. So that someone who has a good year doesn't have to support anyone else unless he chooses to be in the four fund basis where he is averaging his credits, and as I said, that money

that is left over after payment of the current performance is redistributed among the people who are on the four fund basis.

Q So if he is doing any subsidizing it is a matter of choice in the hope that one day perhaps he will be subsidized?

A Yes, but he is doing it only if he is on a four fund basis.

Q Now, Professor Fisher said also, and here I am at Page 1762, Line 19, going on from what he had said before, "The result of this is that if a new society is to form and succeed and provide a substitute for the blanket license, it is going to have to attract established writers who own the copyrights on standard music. In order to do that, it is going to have to subsidize them as they are in the ASCAP system, and they are going to have to do that. They are going to have to do that. They are going to have to attract new writers and set up with a miniature four fund system. That is going to prevent a new society from forming I think on a small scale."

Do you agree with those statements of Dr. Fisher's?

A Well, here again I think that there is a

misunderstanding of what the performing rights industry and the music industry is about.

Every year we have a number of people who leave ASCAP membership, to go to BMI. We have people coming from BMI to ASCAP. We have people going to ASCAP, from SESAC.

Q That is S-E-S-A-C?

A Right, the third performing rights organization in the United States, quite a small one. Neither BMI nor SESAC have four fund systems. I know of no other society in the world that has a four fund system. BMI was created by the broadcasters and by CBS for that matter without a four fund system.

I don't see why the requirements of the industry all of a sudden would be thought of to have a four fund system. You might have to have inducements to a writer or a publisher which would make it interesting for him to change affiliation, and the fact that writers and publishers do move from licensing organization to licensing organization indicates that those inducements are available, but they are not the four fund system, and if one were to establish a new licensing organization, I think one would have to examine the kinds of things that might interest a new

writer or publisher. Certainly one would be interested in having successful writers and publishers.

Your Honor has pointed out that maybe the dynamics of our economy today are such that you would want all of your money as quickly as possible, but if so, that doesn't favor a four-fund system, an averaging system.

So what I am saying is that I can certainly conceive of the establishment of another performance rights licensing organization without the utilization of a four fund system.

Q And ASCAP's having a four fund system has not operated to prevent the society from losing members?

A Certainly has not.

Q You mentioned that you lost some members to BMI. Have they all been members of no consequence or have some of them been more significant members of ASCAP?

A Well, some of them have been quite substantial members of ASCAP.

THE COURT: Publishers or writers or both?

THE WITNESS: In the main, your Honor, we are talking about writers. We have lost publishers. Usually a publisher will, if he wants to shift catalog, might be able to do so by the establishment of a new publishing firm

at the other organization so that he has different problems than a writer has.

Q Actually today, would you say that most of leading publishers belong to both ASCAP and BMI?

A I would say that they have publishing companies which are members of ASCAP or affiliates of BMI, yes.

Q Now, Professor Fisher saw another bar to the formation of a new society, as he put it at Page 1765, his belief that membership in ASCAP is an all or nothing thing, and I am referring to Line 20 at Page 71765, where he said, "At least ASCAP, and I believe BMI, have provisions that say that you can't be a member while they -- while they may be able to deal directly, your members or affiliates cannot also be members of another performing rights society and license part of their work through such a society. So this is an all or nothing thing as to which society a man belongs to. That also prevents another society from forming with the same membership."

Is that an accurate statement?

MR. HRUSKA: May I just point out, your Honor, I think there is a typographical error on Line 24. I think that should be "license part of their works," rather than part of their work.

THE COURT: All r ight.

MR. TOPKIS: I have no quarrel with that correction.

THE COURT: Add an "s" to the word "work."

MR. TOPKIS: Right.

A Well, here again I think we are talking about a misunderstanding of some of the factors involved. When Professor Fisher says that one cannot be a member of one organization and an affiliate of another, that is correct, but that doesn't mean that one can't be a member or affiliate of one organization and license works through another.

For instance, an ASCAP member presently may resign from the society and he has a right to do so at the end of any year by giving three months' notice, and continue to license his works through the society if there is a member --

THE COURT: Even if he becomes an affiliate of BMI?

THE WITNESS: Even if he becomes an affiliate of BMI or SESAC, and continue receiving payments from the society on a current performance basis, so that if he is concerned about the risks that he is taking in moving, it is not an all or nothing thing. He can leave his

works and continue to be paid and put his new works in the new organization.

Q I see.

A And still receive payment the same way any current member of the society is paid on a current performance basis.

Q You mentioned before, Mr. Marks, that the society in various ways rewards serious composers more than popular composers. I think you said that that is done in part by surveying two serious music stations more deeply than others. Is it done in any other way?

A Yes, and I think one should realize that it is not a question of compensating the serious members more than the popular members, which sounds as though there is a tug of war between them, but it is the popular members who, by reason of their numbers and their performances in the United States, really have made the decision to allocate some portion of the money which would otherwise be going to them to this area of serious music, and it is done in various forms. And here again we are talking about important exceptions to the way in which the money is paid out, allocated by media.

First, in radio and television, where there are performances of a serious work of extended duration above, I believe it is, four minutes, instead of getting merely the credit that a feature performance would get, a serious writer and publisher gets a feature performance credit multiplied by a factor which depends upon the extent of duration of the work. We know that serious

works tend to be longer in duration, and that factor gives them additional credit for those performances.

In addition to that, remember we spoke about symphony concert.

THE COURT: May I find out here with Mr. Topkis is trying to establish by going into this subject? I find it very interesting and I find it commendable that serious music is subsidized to some extent in this way, but I can't distinguish what the connection would be.

MR. TOPKIS: Your Honor, I think the fact that serious music is subsidized in this fashion is a part of the demonstration that the adoption of a per-use system would create undesirable consequences, and I think that a Court need not --

THE COURT: Well, first, assuming that I can take into consideration any undesirable consequences, and take seriously the proposition that the cultural effect of whatever comes out of this case is certainly something that should be given some weight, you also, it seems to me, would have to establish, to be successful on this leg of your rationale, that it would not be possible to continue such arrangements under a per-use system.

MR. TOPKIS: I agree, your Honor. I will, indeed.

BY MR. TOPKIS:

Q Just to put it in scale, Mr. Marks, and without intruding upon anybody's privacy --

MR. HRUSKA: May I interrupt for one moment, your Honor? I think that I probably should say something for the record in the light of the last exchange, that it is of course our position that effcts, if any, on the culture of this country generally or with respect to music in particular are totally irrelevant to this lawsuit, totally, under the Sherman Act.

Q Just to have matters in scale, Mr. Marks, and as I was saying without intruding upon anybody, any individual's privacy, could you tell us whether any of the serious composers of music rank among the higher recipients of royalties from ASCAP?

A Yes, they do.

Q Do you happen to know where -- well --

MR. TOPKIS: Your Honor, there isn't any secret about this. I have the tabulation in front of me and I will be glad to show it to Mr. Hruska. I think we are glad to be able to say that the estate of Bela Bartok was our 14th ranking recipient in 1972.

THE COURT: Too bad he didn't get more money before he died.

MR. TOPKIS: We will come to that in a moment, your Honor.

MR. JRUSKA: Can we shortcut this? We have a list that we have gotten from ASCAP which was originally put in a status of that protective order of the top 50 writer-distributees and may be we can just put that in evidence and all the facts.

MR. TOPKIS: Well, I don't want to invade anybody's privacy. That is why I am doing it this way. I have got the whole list right here, but I don't see any reason why we should spread anybody's income figures on this record needlessly.

THE COURT: No, I don't either, but isn't that what you are doing?

MR. TOPKIS: No.

THE COURT: I am not being facetious.

MR. TOPKIS: I am not putting any figures on.

THE COURT: The figures, all right.

MR. TOPKIS: I am not putting any figure on it.

THE COURT: You are just showing who is in the highest ranks.

MR. TOPKIS: Right. The Bartok estate was 14th. Aaron Copland is, I think, 19th, if I count

right.

THE COURT: You don't have the top 10?

MR. TOPKIS: No, your Honor.

THE COURT: How about Leonard Bernstein?

MR. TOPKIS: Leonard Bernstein is -- Leonard Bernstein gets it both ways, I think.

THE COURT: That is because he writes various types of music.

MR. TOPKIS: Leonard Bernstein gets about half as much as Larry Hart.

THE COURT: Samuel Barber or Menotti?

MR. TOPKIS: Leonard Bernstein is our 47th ranking member, or at least was in 1972, and Duke Ellington was 57th.

THE COURT: Well, I'd be very interested in perusing that some time.

MR. TOPKIS: I'd be delighted to make it available.

And we also find in the list of our top 100 Samuel Barber -- it's a little farther down -- Rachmaninoff, Stravinsky, Mahler, Ernst Bloch and so forth.

THE COURT: You should be very proud of your membership.

MR. TOPKIS: That is no understatement to say that I feel I am in very good company.

BY MR. TOPKIS:

Q All right.

A I haven't finished really the answer to the question you asked me, Mr. Topkis. You asked what other things the society does in the way of reallocating distributions towards the serious field.

Q Right. I mentioned in the first instance the extended multiplier for extended duration works on radio and television. In the symphony and concert field, that is, symphony orchestra performances and concerts licensed by the society, the society pays out many times more in the way of distributable revenue than it takes in from lists in this area. Probably in the neighborhood of a million and a half to two million more than it takes in is paid out to writers and publishers of serious works in the symphony and concert field, and this is in line with the weighting formula provisions for serious music.

Q Those provisions too are all part of the formulae as proposed by this Court?

A That is correct. In addition to that, there are two awards panels established under the judgment

made up of individuals who are not members of the society, and these two panels have the responsibility for allocating what is presently something in the neighborhood of $700,000 to members who have performances of works which, in the opinion of the panel, are not adqquately reflected in distributions; and members whose works have a unique prestige value not adequately compensated by distributions; and members who have performances in media not surveyed.

Each panel distributes about half of the amount I just mentioned, and one of these panels has responsibility for popular and production catalogs, writers with popular catalogs. The other panel has responsibility for distribution to writers with serious catalogs.

Naturally there are many fewer serious writers and the amounts of those awards are fewer but much higher in value because there are fewer writers.

We have such people on the panel as Walter Hendl, who is the former chairman who is dean of Rochester School and former associate conductor of the Chicago Symphony; Donald Engel, who is now managing the Minneapolis Symphony; Milton Katims, who is conductor of the Seattle Symphony presently; Frederick Fennell, bandmaster, who is conductor of the Miami Symphony; Donald Brown, who is an expert

in gospel music and director of the Barrington School of Music in Rhode Island; Louis Wersen, who is the former head of the -- president of the Music Educators National Conference in charge of music education in Philadelphia public schools.

These people meet twice a year and members send in information that they think should be brought to the attention of the panel.

The panel also reviews the files of the society and makes these awards. Under the judgment the awards must ebe announced to the entire membership at least no later than 30 days prior to the distribution of the award money.

On the popular panel we have Father Norman O'Connor, who is first vice president of the National Academy of Recording Arts and Sciences. He is a Paulist father and also known as the Jazz Priest. You may have seen his program, Dial M For Music, I think maybe a CBS program. J. Haydn Proctor of the Supreme Court of New Jersey; T. Edward Hambleton of the APA-Phenix; William B. Williams, the noted disk jockey. These people serve the same function on the popular side as the standard people do on the serious side.

Q Are these the so-called awards panels?

A That's right, and this money, as I say, is distributed outside of the survey picture by these panels and announced to the membership twice each year.

Q His Honor said something about Bela Bartok and the regrettable economic state in which he spent the declining years of his life. Does the society make any provision for relief payments for members?

A Yes, it does.

MR. HRUSKA: Your Honor, I really press my objection here.

THE COURT: I think this aspect of it is probably irrelevant. I suppose you can make any connection you want once you accept the proposition that encouragement of music may be regarded as a public benefit and you can consider the fact that the encouragement of any musician has a public benefit and the relief of any musician has public benefit.

I personally would agree with that insofar as affording relief for Mr. Bartok in his declining years, but I think it is too remote from this situation.

MR. TOPKIS: All right. Very well. I will pass to another subject.

Q Let's go, Mr. Marks, to the society's connections with the foreign societies that you mentioned in your testimony earlier. You remember I showed you a list, Exhibit 234, of the foreign societies.

Let me ask you, how does the society, that is, ASCAP, make payment to foreign societies?

A Well, ASCAP represents the repertories of a number of foreign societies with which it has agreements and it allocates performance credits to the performances of work in the repertories of those societies in the same manner that it allocates performance credits to the works of members of ASCAP.

The credits are computed, the same multipliers are applied, but the foreign society credits are paid out all on a current performance basis, and those payments are made once a year to those foreign societies.

Q I understand that sometimes a work originally published abroad will be published in the United States by what is called an American sub-publisher, I believe, is that right?

A That's correct.

Q When that happens with a foreign work written abroad, or iginally published abroad, how does the society handle that, that is to say, how do you handle the performance of such a work?

A Well, you remember I said that the credits are allocated the same way that they are allocated for works

in the domestic repertory. If the publisher of the work is sharing those credits with an American sub-publisher then 50 per cent would be paid allocated to the American sub-publisher and 50 per cent of the credits to the foreign society for the foreign publisher.

It may be that 100 per cent of the credit will go to the foreign society for the foreign publisher or it may be that 100 per cent of the credit may stay in the United States with the American sub-publisher.

THE COURT: How would you know? Would that be on the basis of instructions received from somebody who is an authority?

THE WITNESS: That is correct, your Honor. We would receive instructions from our member and a confirmation from the foreign society.

Q These arrangements that you have with foreign societies, Mr. Marks, what term are they?

A From year to year.

Q Is there anything of which you are aware which would prevent CBS from going to a foreign society and making a direct license arrangement as to that society's repertory?

A No, I don't know of anything that would prevent it.

Q How about the revenues which ASCAP receives from foreign societies, that $9 million figure we saw on the annual report yesterday? How do you distribute that?

A Well, there are a number -- that money is coming in from a large number of different societies in varying amounts depending upon the income of the particular society and the form of the information varies depending upon the sophistication in reporting by the various societies.

Generally speaking, that money is paid out based on the reports that come in from the various societies, but in line with the judgment, if they are societies that pay us in such a manner that we can't determine who the writers and the publishers are for a particular work and allocate those shares, the money from -- thus reported is paid out over the identifiable performances in countries reporting in a manner which can be broken down and computed.

An example of this kind of thing is the receipt of information about a songle title that is translated into a foreign song title without giving the American original.

Very often these are not literal translations. It would be almost impossible to tell what the translated

song title refers to.

This may happen with motion picture films as well. So that this money is paid out on the basis of identifiable statements to the extent possible.

THE COURT: Mr. Topkis, I have to recess a few minutes ahead of time.

We will be back again at two o'clock.

MR. TOPKIS: Fine.

(Luncheon recess.)

P A U L M A R K S resumed.

DIRECT EXAMINATION (continued)

BY MR. TOPKIS:

Q Mr. Marks, I think there has been testimony here that for commercials which will be broadcast on television, it is the practice to use music. Could you tell me, does the society have any practice with reference to the performance of such music as may appear on telecast commercials?

A Yes, it does. My experience has been that most of the commercials use music that is written directly for those commercials, and also that when it comes to such commercials, the writer in the overwhelming majority of cases, almost all the cases, will have granted rights directly to the agency for those commercials.

Q You mean for the performance of those commercials?

A That's right, will have granted performing rights to the agency for the performance of those commercials.

For that reason, when a member registers a commercial with the society or if a commercial appears on a program, we send a letter to the member saying just what I have said, that our experience is that most members

have granted rights directly, and under the circumstances, we would like to see a copy of his agreement with the agency in order to determine whether the society does in fact have the rights to those jingles.

Over the years, I have had occasion to look at a good mahy of those contracts, and as I said, my experience has been in the overwhelming majority of them, these rights are granted directly to the agency.

THE COURT: The advertising agency?

THE WITNESS: The advertising agency, your Honor.

Q So does the society usually give or not give performance credit for the performance of such a composition?

A It usually does not credit jingles when they come into the survey; only whether it is established that we have the rights.

Q Do you have any operating presumption?

A Yes, as I said, the presumption has been and is that the rights have been granted directly unless it is established by reason of reviewing the contract that the rights have been retained by the member for licensing through --

THE COURT: Does that presumption have any more practical effect than to impel you to find out what the actual facts are?

THE WITNESS: Well, the -- that is the effect of it, your Honor, but the presumption itself is based on our experience.

THE COURT: I understand that, but you are not suggesting, for example, that you don't pay any royalties on commercials because youassume that they are all licensed through an advertising agency?

As I understand what you are saying is you have found from experience that is generally true, and therefore when a member comes to you, you say, "Will you please let us know what your arrangements are with your advertising agency so that we can see whether you have any rights to give us to license for you or you don't." Is that right?

THE WITNESS: That's right. This is contrary to the usual practice where we assume that the rights are in the society, and here more than just generally, as I say, it is very -- unusual. That is not the case; and mainly the agencies -- and I have spoken to agencies about it over the years -- have just felt that these -- they want to protect --

MR. HRUSKA: I object to this, your Honor. I think it is hearsay the witness is about to give.

THE COURT: If you are going to tell us what the agencies say, I think Mr. Hruska is right.

A Well, it bears on the reason for the presumption but --

THE COURT: Nobody is challenging the reason for the presumption at this stage anyway. I just want to know what the consequences in your action is, in ASCAP's action, of the presumptions are. I think I understand that.

Q Can you give us an estimate of the frequency with which the society gives performance credit on music used on television commercials? Is it a frequent happening, an infrequent happening?

MR. HRUSKA: Here again, your Honor, I think we ought to get the figures on this. This is an important area.

THE COURT: If you really wish to press the point, I take it this is relevant to the commercials in the can.

MR. TOPKIS: Right.

THE COURT: That has been in your arguments on motion yesterday both sides made it clear they considered that a significant proposition within the litigation.

Therefore, if you are trying to persuade me that commercials in the can really are not so impor tant because of the line that you are now developing, I think whatever

figures are to be given should be hard figures and not generalizations about frequent or infrequent.

MR. TOPKIS: Well, we have a problem, your Honor, which perhaps I can develop.

Q Mr. Marks, does CBS report to you its use of commercials on CTN?

A Not usually. We often have to request CBS to report because a member has indicated to us that they had commercials which they believe are to be licensed through the society.

We do get reports on JWT, J. Walter Thompson commercials from CBS.

Q Do you have any idea how frequent?

THE COURT: How frequently you get the reports?

MR. TOPKIS: Yes.

THE COURT: Would you get them very time something is played or would they be collected and transmitted at some particular time?

MR. TOPKIS: Perhaps the witness can tell us.

A I think often these reports would come in as supplementary information. They may be indicated on the program or they may be given to us subsequently, your Honor, so it happens both ways.

And often the member will have to request that the agency advise the network to tell us of particular commercial performances because the network will not have so informed us.

Q So that unless you do receive such a report from the networks, you don't have any knowledge as to what commercials have been broadcast, is that right?

A That's right, unless we happen to hear the commercial in our test check of the network week.

Q Mr. Marks, going back just a second to the organization of the society, one subject that we did not touch on was a group known as the board of review. Can you tell us, please, what is the board of review?

A The board of review is an internal tribunal, administrative tribunal, established under the judgment, the members of which are elected by the society in the same manner that members are elected to the board of directors of the society, an equal number of writers and publishers, and a requirement that I think one of the number be a serious writer and one a serious publisher.

The purpose of the board is to meet to determine complaints of protests from members. Any member has the right to bring a protest before the board with regard to any of his distributions or with regard to a rule relating to the distributions within nine months of receipt of his last annual statement.

You remember I mentioned that whenever a rule is changed notice is given to the membership. If the rule involves a change in the judgment, then a hearing date is eset and notice is sent to the members that they may appear and give evidence with regard to that change.

But in addition to that, the board of review would have jurisdiction as to complaints brought before it

by members with regard to the rules or with regard to their distribution.

Q Is there any appeal from the decisions of the board of review?

A Yes, an appeal can be taken to the American Arbitration Association, and those appeals have been taken to the American Arbitration Association.

Q Mr. Marks —

THE COURT: You mean to an arbitrator appointed under the rules of the American Arbitration Association or to the association itself?

THE WITNESS: To an arbitrator — actually, to three arbitrators, your Honor.

THE COURT: One appointed by each and the third appointed by them or what?

THE WITNESS: No. It is from a panel that the Arbitration Association —

THE COURT: But it is the same general procedure as is normally followed in commercial arbitrations?

THE WITNESS: Yes, your Honor, right.

BY MR. TOPKIS:

Q Mr. Marks, could you tell us, please, as to new works entering the society's repertory? How do

you learn about them?

A Well, there may be various ways in which we learn about new works. First a member on his application for membership will list his works.

Next, members are provided with index cards, a 3 x 5 card, which they are supposed to fill out for each of their works. Usually it is the publisher's responsibility. The writer may also do it. In many cases he does.

Those cards are filed alphabetically by title of composition.

We may find out about a work when it first appears in the survey if a member has not yet given this information about the work. We then have to inquire of members as to what the data is as to that work.

We are also on subscription from the Library of Congress for the registration of music copyrights, so that we receive a 3 x 5 card for each piece of music that is registered with the Library of Congress for copyrighting and published or unpublished.

Q How about when a publisher records a new song; do you usually learn about that when there is a recording of a new work?

A There is also a file of record information.

We receive what is referred to as label copy from a large number of the leading record companies which would indicate which works have been recorded, and that information is transferred to an index file as well.

There is also a cue sheet file for cue sheets indicating the music uses on film, programs, or motion picture -- motion pictures either gone to television and feature films, et cetera.

Q Do I understand that when a song is recorded for the first time you are likely to hear about that song either from the publisher or from the record company?

A Well, hopefully we would hear about it by reason of a card submitted by the publisher. It may be that the publisher has not submitted a card, an index card. We might get the information from -- it's not unusual to find that a member has neglected to send us a card, and we might have to get the information from subisdiary sources. Also, the trade papers, the pop charts are a source for data.

Q So would it be accurate to say in sum the society is continuously on the lookout for new compositions that are entering and have entered its repertory?

A That is correct. We may have a member

appearing on a program and performing a work without having been previously sent in with an index card. In that event we hear from the network, if it is a network program, and query the member.

Q So by these various techniques you learn information about new compositions, and do I understand that this information is entered, as to each composition, on a 3 x 5 card in your index file?

A That is correct.

Q Now, unless and until a composition's performance is picked up in your survey, does the existence of that composition in any way become a fact recorded in your computer data bank?

A No, until it has appeared in the society's survey of performances it would not be keyed into the computer.

THE COURT: What would be the latest date, a year later or how long would the time lag be?

THE WITNESS: Well, you remember, your Honor, I was giving the example this morning of the publisher payment in July based on -- based in part on performances in October, November, December of '72.

THE COURT: That has to do with data that you are keeping for the purpose of making distributions,

is that right?

A. That is right.

THE COURT: Is that the first occasion on which -- how can I put it -- information as to the new song would get into the computer?

THE WITNESS: That's right, it would -- that would be the first instance it would come out of the computer. It would come out in July. They would start to punch that in in March, April and May. We wouldn't know what's in the computer until the run comes out that -- upon which the distribution is based.

THE COURT: I take it your agreement--I am sure I must know the answer to this; I think I do--that your agreement with your members permits you to license their works even after they have become members and even without any express further permission on their part, is that right?

THE WITNESS: Yes, your Honor. It's a general grant.

THE COURT: So as soon as you learn about the fact that he has written something new you have to do something about it?

THE WITNESS: That's right. As a matter of fact, as soon as he has written anything it becomes a part of the repertoire. He doesn't have to do anything else with it. We may not find out about it until some subsequent point.

THE COURT: If you don't know you can't do anything about it, but as soon as you find out about it you have to do something about it.

THE WITNESS: It's more of a passive act, other than just filing an index card, until it appears in the Society's survey of performance.

THE COURT: Right.

Q From the time of a recorded performance--by a recorded performance I mean a performance which is in some

way noticed by the Society--from that time how long is it typically until the existence of a new composition becomes recorded in the Society's computer?

A Well, as I say, I think the best way to explain that is by example. In July we will be paying out distributions based in part on performances in October, November and December of 1972.

Q When will the fact of those performances have been punched into the computer?

A Oh, most probably during the latter part of March, April, May and June.

THE COURT: So the time lag could be six, seven, eight months between the time that you actually learn that there is such a new composition or that it has been performed and the time when that information is fed into the computer?

THE WITNESS: That's right, your Honor.

Q There were on the stand last week, Mr. Marks, as perhaps you are aware, Professor Southworth and Mr. Kaplan, who testified that ASCAP's current computer installation could be modified to adapt to use under the per use system, and they testified also in connection with the possible preparation of a so-called online system whereby contributors would operate under a per use system. They gave, Mr.

Kaplan, in particular, gave some cost estimates.

I wonder whether in your capacity as Distribution Manager and Director of Operations of ASCAP you have had any experience which would cast light on the accuracy of such estimates.

MR. HRUSKA: Your Honor, I object to that question I think it's leading in the sense that it is a blind question.

THE COURT: I don't think the question gets us very far. He may have had some experience which casts some light.

I think I am reasonably well aware of the rather broad range of Mr. Marks' experience. If you want to ask him whether he feels competent to answer a particular question or put a particular question, I think that's a better way to proceed with this particular witness.

MR. TOPKIS: All right, your Honor. I will try again, if I may.

Q Mr. Marks, have you had occasion down through the years to negotiate for the preparation of computer programs and the leasing of computer equipment on behalf of ASCAP?

A Yes, I have.

Q Frequently?

A Oh, in the process of doing it this year, last

year, several times in the past years.

Q In fact, from the time that you left I became Service Bureau Corporation behind and installed your own installation, have you been in charge of ASCAP's data processing or at least had ultimate responsibility for it?

A Well, as distribution manager I shared that responsibility with the controller. As Director of Operations, he reports to me on those responsibilities.

Q Have you had experience with estimates furnished to you by vendors of data processing services and less sources of data processing equipment?

A Yes, sir, I have, and also with our own people who perform data processing jobs and who have responsibility for development of systems and data processing approaches to those systems.

Q Have you had any occasion to observe whether the estimates offered you have been reliable or unreliable?

A Well, as an administrator, my expertise and concern is with the development of those systems and not with the actual technique of how they are developed. But my experience has certainly been that invariably data processing people and systems people will underestimate the difficulties involved in achieving a lot of the objectives that you put to them. I think they will try to sell data

processing techniques as opposed to let's say clerical techniques and one often finds that you have got to reach the time a good deal along with the bills before you get the job accomplished.

As a matter of fact, I recently attended a technical conference, international technical conference--

MR. HRUSKA: I object to this, your Honor.

THE COURT: Sustained.

Q Mr. Marks, has there recently been an international conference of performing rights societies representatives to consider the problems encountered, if any, of using data processing equipment in connection with music performance rights licensing?

A Yes, there has been.

Q Did you attend such a conference?

A Yes, I did.

Q How long did it last?

A A week.

Q When was it?

A In April.

Q And where was it?

A In Zurich.

Q I take it that you wouldn't have spent a week discussing nothing and in consequence there was some dis-

cussion of problems.

THE COURT: Yes, we all take that. Although there might have been some skiing.

Q In that case, Mr. Marks, I have another reason to envy you.

Mr. Marks, April Music is a member of ASCAP, of course?

A Yes, it is.

Q Is it one of the larger publisher members of ASCAP?

A Yes.

MR. HRUSKA: Objection, your Honor.

THE COURT: What?

MR. HRUSKA: Objection, your Honor.

THE COURT: What?

MR. HRUSKA: I object to the question.

THE COURT: Why?

MR.HRUSKA: Because it is a quantitative area in which Mr. Marks is giving a qualitative answer, and for that reason I do not think it is competent.

MR. TOPKIS: We will give the exact figures.

THE COURT: First of all, the objection is overruled on the grounds that Mr. Hruska refine the answer under cross examination if he wants to.

MR. TOPKIS: I don't think there is any uncertainty about it, your Honor.

MR. HRUSKA: If we are going to have exact figures, we better clear the courtroom. This has been put in under a protective order. I think it ought to be given the same treatment as the treatment given by ASCAP to its other publisher members.

MR. TOPKIS: Be delighted.

THE COURT: Why can't we do it in a simplier way. I don't suppose you need to put the figure in at this moment.

MR. TOPKIS: I will put it in a letter and put it in a sealed envelope.

THE COURT: All right.

Q Have you had any conversations in the recent past, Mr. Marks, with any executive of April about its--just so I won't be accused of leading--rise or fall, growth or decline?

A Yes, I have. I have recently spoken with Mr. Koppelman, who--

Q Who is Mr. Koppleman?

A Newly appointed to run April Music.

Q Can you tell us what happened, what was said in that conversation between you and Mr. Koppelman about the

growth or decline of April Music?

A Well, Mr. Koppelman indicated that he had been hired to run April Music and to make it one of the most significant publishing firms in the industry, and in fact a few days ago Mr. Koppelman was quoted to that effect in the trade press.

MR. HRUSKA: I move to strike that, your Honor.

THE COURT: I am at a loss what this is all about, but I agree that the reference to the newpaper means nothing.

MR. TOPKIS: I consent to it.

I think that's all, your Honor, except that yesterday we identified the performed works index as Exhibit 236 for identification, the three hard bound volumes and we identified supplements thereto in data processing form, data processing print out form, rather, as 237 for identification, and I would like now to offer them.

MR. HRUSKA: I would object to that, your Honor, only for this reason:

We plant to put in evidence the performed works index, print out and tape, that was supplied to us by ASCAP and which was current, as I understand it, as of a month or so prior to the commencement of this trial.

In other words, more current than the combination of the three bound volumes and the print outs that are

sitting on the table.

THE COURT: You haven't done it. I am not saying that you won't.

MR. HRUSKA: I realize that. My point is--and it really is perhaps an offer in open court to ASCAP--that since both parties have available to us a current form of this index--

THE COURT: Any objection?

MR. TOPKIS: No.

THE COURT: Mr. Topkis has agreed that in lieu of 236 and 7 the parties either jointly or however you wish to offer it will place in evidence the most recent--

MR. TOPKIS: 236 I don't think there is any dispute about.

THE COURT: That is the existing bound volumes.

MR. TOPKIS: Right.

MR. HRUSKA: Except--

THE COURT: What difference does it make if I have them? I don't know what reference will be made to them. If you want to put the Encyclopedia Britannica in evidence, if you think it will prove something, I will allow it.

How do we describe the exhibit that will be substituted for 237?

MR. TOPKIS: Whatever Mr. Hruska wants.

MR. HRUSKA: It is, as I understand it, as it was represented to us by ASCAP, one, a reel or reels of magnetic tape which as of the time they were prepared had on them the names of the songs, titles of the songs, and various other related information to all the songs in the ASCAP index of performed works.

THE COURT: I don't know to what extent, of course, ASCAP---

MR. HRUSKA: And a print out of that.

THE COURT: Obviously if I am to be requested to deduce anything from the exhibit I will have to see it in print out form.

MR. HRUSKA: Yes, obviously.

MR. TOPKIS: I think our problem is this.

The one Mr. Hruska has is arranged by composer and the one that we refer to as the index of performed compositions is arranged by title. It's what we routinely use in our business.

MR. HRUSKA: Of course, the tape can be arranged any way.

THE COURT: Why don't we disseminate them both as items in evidence and the parties bring to my attention whatever they want to bring to my attention.

MR. TOPKIS: Very well. Then 236 and 237 may be received?

THE COURT: Are received in evidence.

xx (ASCAP Exhibit 236 and ASCAP Exhibit 237 received in evidence.)

MR. TOPKIS: We have no further questions.

THE COURT: Are you ready to proceed?

MR. HRUSKA: Yes, your Honor.

THE COURT: Off the record for a moment.

(Discussion off the record.)

MR. HRUSKA: Your Honor, you asked me if I was ready to cross examine. I am ready to cross examine, but I should perhaps point this out:

Mr. Marks has given testimony on many, many areas.

THE COURT: I know.

MR. HRUSKA: Of course, we did not, as I mentioned earlier, receive any notice from ASCAP as to the subjects that Mr. Marks would cover. There are some areas of his testimony which are very, very complex, and rather than attempting to perhaps stumble around now, not having all the materials at my fingertips which I otherwise would have collected, collated and studied prior to examining Mr. Marks, it may be that part of the cross examination could be deferred until we had an opportunity to do that. We will, of

course, be breaking for some period of time, and if we could complete the cross examination of Mr. Marks at the next session of days it would be, I think, far more useful and probably shorter than if I were to attempt to cover all the subjects right now.

THE COURT: Let's go as far as we can and see what we have left.

MR. HRUSKA: Yes, I want to do that.

CROSS EXAMINATION

XX BY MR. HRUSKA:

Q You testified, Mr. Marks, about your experience with data processing people submitting estimates of jobs, cost estimates. Have you received firm bids from outside independent service bureau companies within say the past ten years?

A Well, if by firm bids you are referring to the leasing of equipment--

Q No, no, no. I mean not on the leasing of equipment but on the preparation of programs or systems for the use of lease equipment, leased or purchased equipment.

A Most of those have been done internally.

Q Internally?

A Yes.

Q How many bids from outside service bureaus have you gotten in the last ten years?

A Well, I said that there were several in the last ten years, youknow, three or four.

Q From what companies?

A Well, one we have had--these are not bids. These are estimates from Arthur Young and Company.

Q Could we confine ourselves for the moment to bids? Have you gotten any bids in the last ten years?

A I can't recall specifically at this time, no.

Q Is this the sort of thing you would be likely to recall if it happened?

A I might or might now, depending upon the significance or the particular occasion.

Q If it was a significant job and a bid was made you would recall it?

A I would think if it were significant in size I might--certainly would recall it.

Q So we can quickly conclude that you have not received any bids from any outside service bureau organizations in the last ten years on any job of significance, right?

A No. If you are confining yourself to bids on particular jobs, that's correct.

THE COURT: I don't understand if you are talking about bids to perform a particular service or bids to enter

into a continuing relationship to perform all the computing services desired by ASCAP or both.

MR. HRUSKA: Both, both.

THE COURT: Mr. Marks, you understand?

THE WITNESS: There may be a problem here, your Honor, in the use of the word bid. What I am referring to, if we are talking about a fixed price bid--

MR. HRUSKA: Thatis what I am talking about, fixed price bid.

THE WITNESS: --then I have not entertained one of significant size.

If we are talking about the retention of a service for the purpose of designing systems and estimates as to the cost of those systems at various stages, then there have been.

MR. HRUSKA: I will take that up in a moment. Let me just make a note.

Q Have you ever dealt with anybody from PMI, Programming Methods, Inc.?

A No, I have not.

end 2

Q Are you aware of the fact that service bureau companies like PMI do make firm bids to prospective clients?

A Yes, I am.

Q And are you aware of the fact that when they make those bids, they are committed to deliver that service at the price bid?

A If -- I am aware that if the company makes a fixed price bid, it may under its contract be committed to deliver the price if that is what its contract provides, if there are no other clauses that provide for differences given to different circumstances during the carrying out of the services.

Q In other words, a change of the job? A change of the job descript ion?

A That's right. It may be a change of the job specifications.

THE COURT: In brief, you know that some companies can and do commit themselves to a fixed cost or a fixed service, right?

THE WITNESS: That's right.

THE COURT: We all know that can be done and apparently you agree that it is done from time to time in the industry?

A My understanding, your Honor, yes.

Q On estimates of services, what outside organizations have given you those other than Arthur Young?

A I don't recall specifically what programming jobs. Usually that is handled through our data processing people. I wouldn't have occasion to know.

Q All right.

A You recall, Mr. Hruska, that one of the significant examples I gave was in the original estimate for the conduct of the entire distribution system, and that was an estimate received from the Service Bureau Corporation, which is a subsidiary of IBM.

Q Was this a firm bid?

A That was a firm bid for the period covered by the bid. The problem was in the subsequent year when we went to renew that contract the bid was doubled, so that while you may be protected for the period of the firm bid, you are also subject to getting into a circumstances where you maybe may have to increase the amount of payment significantly when that bid period ends; and that was one of the examples I was giving this morning.

Q When was that first bid given to you by the Service Bureau Corporation?

A That was in the early sixties, late fifties.

Q The bid covered the first year of the job?

A First year or two, as I recall.

Q And did it cover programming services and equipment or was it just programming services?

A It covered really the whole carrying out of the distribution process.

Q It was going to be done in the offices of the Service Bureau Corporation?

A It was done.

Q That was the contemplated procedure when the bid was made by Service Bureau?

A Well, as I say it was -- the contract was with Service Bureau. It was in fact done by Service Bureau at their computer.

Q I am sorry, Mr. Marks. We are at cross purposes at the moment. I am asking you about the bid that the Service Bureau Corporation submitted to ASCAP, which I assume was prior to your coming into contractual relations with the Service Bureau Company. Is that true?

THE COURT: In other words, did you enter into a contract before the services were performed? Presumably you did.

A In the first -- remember I said that the Service

Bureau was doing the job. Before they did the job we entered into a contract.

Q Before you entered into a contract, you received a bid from the Service Bureau Company?

A That's correct.

Q That bid, let's focus on that, before anything was done, before you accepted the bid, the bid contemplated that the job would be done in the offices of the Service Bureau Corp., right?

A Well, Mr. Hruska, I am not trying to quibble. The job was, you know, quite large size. Some of it was done -- the computer part of it was certainly done at the Service Bureau computer.

Q Right.

A There may have been some services that they performed at the society as well.

Q That Service Bureau employees performed at the offices of ASCAP?

A That's right.

Q I see.

A There may be. I don't recall.

Q This bid that Service Bureau put in, it was a bid which covered the cost of Service Bureau equipment which would be devoted to ASCAP, p lus the time of Service Bureau

personnel both machine operators and programmers and related personnel?

A Yes, I believe so.

Q The whole thing?

A I believe so.

MR. TOPKIS: Excuse me, Mr. Hruska, I understand that you are enthusiastic, but your Honor could counsel be directed to let Mr. Marks finish his responses?

THE COURT: I thought he had.

MR. TOPKIS: Well, I am not sure.

THE COURT: Mr. Marks, in case you haven't finished your response at any time, simply advise Mr. Hruska.

THE WITNESS: Thank you, your Honor.

Q That first bid which you got from the Service Bureau Company related to this whole job, machine and personnel, etc., for one year's time?

A As I said, Mr. Hruska, I don't recall whether it was one year or two years at that point.

Q You said something about it going up in the second year.

A After the period covered by the contract expired

Q I see. What was the period covered by the contract?

A Well, that's what I just referred to as being not sure whether it was one or two years.

Q Could it have been three years?

A Conceivably it could have been three years, but I think it is more likely that it was either one or two.

Q Do you remember the figure by which the -- let's say third year service -- went up over the second year's service on the assumption that the original term was two years?

A As I said, my recollection is that there was a significant increase in price after the termination of the contract period. It may even have been double.

Q But you don't remember?

A I remember that it was quite significant.

Q Do you remember the reasons for the increase?

A Yes, I believe we were told that they had underestimated the requirements of the job, and that it was going to take a hell of a lot more in the way of time, their people and machine time, than they had originally supposed.

Q Who told you this? What is his name?

A I don't remember, Mr. Hruska. It was some time ago.

Q Was it Mr. Guinness?

A No, Mr. Guinness was not associated with the project at that time.

End 3A PM5

Q Is there any possibility in your mind that the price went up because the job got bigger?

A Oh, I doubt very much that that was the reason because the requirements were the same, as I recall.

Q What do you mean by requirements?

A They were processing the performances which occurred in the society's survey in order to translate those performances into performance credits in the manner that I described this morning.

Q Have you ever received an estimate on a job involving the preparation of four programs at about, let's say, 50 man-hours?

A I can't recall receiving an estimate on that kind of a job, specifically for a program of 50 man-hours.

Q Would you agree with me that the range by which an estimate of that nature might be below the actual cost would be considerably narrower than an estimate on a job which encompassed all the machines and all the programing and all the manpower, personnel, necessary to implement the entire ASCAP distribution system?

A Well, Mr. Hruska, if you are hypothesizing that the job required for doing what these experts have said they were told to accomplish would be four programs

and 50 man-hours or 50 programs and four man-hours I couldn't argue with you. I don't know what it would require.

As an administrator my best feeling is that you just don't accomplish the kind of thing that you are trying to accomplish with four programs and 50 man-hours.

Q But you have no particular expertise that would allow you to reach that conclusion, do you, Mr. Marks?

A As I have said, my only expertise is the experience of dealing with data processing people and systems people, and developing systems to accomplish jobs that -- goals that have been set up for them.

THE COURT: You are not a pediatrician but you would know when your child was sick, is that right?

THE WITNESS: Exactly, your Honor.

Q I see, Mr. Marks, you have a copy of AX233 on the ledge there.

A Yes.

Q I'd like you to look at part of it, at code No. 26 for jingles.

A Right.

Q When was that added to the ASCAP distribu-

tion system?

A My best recollection would be in the early '60s. I'm not sure whether it was part of the original weighting formula connected with -- attached to the decree in 1960 or whether it was a subsequent change. There have been a number of changes over the years.

Q In that provision relating to jingles?

A That's what I say. I don't recall whether that was specifically changed or adopted at that time.

Q How did it come into being, do you know? Did a group of members of ASCAP get together and make the request of ASCAP that they add a provision for jingles?

A As I say, I don't know whether it was added. There is always -- the weighting formula is an attempt to state the credit for individual uses of ASCAP works that are performed by licensees relative to each other, and it is, as you can see by reading it or listening to what I have said about it, a fairly complicated accommodation among the members as to what their relative -- the relative values of these performances in connection with the amount of money that is collected from people who license music from the society on a blanket basis.

Q But it is true, isn't it, Mr. Marks, that there would not have been a provision for jingles of this

nature unless some substantial number of ASCAP members wanted it?

A No, Mr. Hruska, that's not true. As a matter of fact, there was some serious discussion as to whether or not any credit should be allocated to jingles or not. BMI does not include jingles in its repertory, and there was some discussion as to whether it was appropriate for us to credit these performances, given the fact, as I have expressed before, that there a very limited number of these jingles that are credited.

It was felt, though, that if an ASCAP member did have the music associated with a jingle, and if that music was licensed by the society, that he was entitled to some payment for the music. So it wasn't a question of substantial usage. Just the opposite. It was a question of whether or not, even though the uses were insubstantial, we should include this payment.

Q Who advocated the inclusion?

A This is a good number of years ago. I do remember the discussion. I don't remember who advocated the inclusion, except that I would advocate the inclusion and I think I advocated it at the time.

Q Do you have data on the number of jingles in this category that are performed every year on television?

A That data would presumably be in the daily detail since the detail lists all performances of each work and indicates the credit symbol. There may also be an accumulation by credit symbol.

Q Could you provide us with such data?

A If we have it, and counsel agrees, or the Court so directs, certainly.

MR. HRUSKA: I think we probably ought to have it, your Honor, because we have gotten qualitative estimates from Mr. Marks, and in an example like this, if the data is obtainable we ought to get it out.

THE COURT: I have no objection, as you heard before, to exhibits being put in when there is a question of its usefulness. Just as I wasn't quite clear this morning as to some of the things Mr. Topkis wasn't trying to prove, I ask you what you are trying to prove with regard to this question of jingles.

MR. HRUSKA: Well, it comes down, I think, basically, your Honor, to whether or not there are a significant number of commercials outstanding in the inventory of all the advertising agencies or sponsors to which the advertising agencies or sponsors do not possess the right to put that on network television without the writer's consent.

THE COURT: You think the number of jingles would be pretty good evidence of what that number was?

MR. HRUSKA: Well, it would be evidence of one part, one category of commercials in the can.

THE COURT: I understand. I would ask ASCAP to see if they can produce those.

MR. TOPKIS: Your Honor, I am a little at a loss to figure out how we can do it, for this reason: CTN does not report jingles to us except on rate instances. We checked a week and found they had reported 16 jingles, and five of them were --

THE COURT: I am not suggesting that you are obligated to make any studies or fabricate any information that isn't in your possession, but whatever information is available can be brought.

MR. TOPKIS: We do have the daily detail sheets Mr. Marks mentioned. I don't know how far back we have them.

How far back do we have them, Mr. Marks, do you know?

THE WITNESS: Oh, they go quite far back, but that -- it's a question of aggregating those. The detail sets them out individually by symbol. I don't know whether they are aggregated at some point.

MR. HRUSKA: Perhaps I can explore this on further cross examination, your Honor.

BY MR. HRUSKA:

Q You have got a credit symbol for this category of jingles. It is 26?

A That is correct.

Q Your quarterly detail report is a computer printout, is that correct?

A That is correct.

Q The information which is printed out is on a magnetic tape, right?

A That is correct.

Q You could select from that magnetic tape all the code No. 26 performances?

A That's what I indicated before, Mr. Hruska. It's on the detail and we may have it summarized by symbol. That is what I said I would review to see.

Q To make it clear, it can be done by data processing rather than by somebody sitting down with a pencil and trying it figure it out manually.

A Yes, it's another one of these programing runs that might have to be done.

Q There was a statement made about networks not reporting on these jingles. Do you know whether

there are jingles, commercials, in which the advertising agency does not have the right to license the network without the writer's consent but that the performance of the jingle on network television is not reported to ASCAP?

A I am not sure I understand your question.

Q I can understand why. Let me repeat it. What I would like to focus on is this category of jingles.

THE COURT: If you understand why he doesn't understand your question, why repeat it?

MR. HRUSKA: My hope, although perhaps not my expectation, is to repeat it in a way in which he will understand it.

Q Let's focus on the category of jingle, a jingle where the advertising agency does not have the right to license the television network without the writer's consent. Any question about that? Do you understand what I mean?

A Where the advertising agency did not have the right to license?

Q The television network, licence the use of that jingle to a television network without the writer's consent.

A Yes.

Q Do you receive reports as to all uses of that category of jingle on network television?

A I don't know, Mr. Hruska. As we said, the networks do not report a great many jingle uses. What they don't report, I don't know, but I think we ought to know, you know, put this -- to put this in focus, you have to realise the kind of payment that we are talking about for a jingle. Customarily --

MR. HRUSKA: Your Honor, I move to strike everything after "put this in focus." I don't think it is responsive to my question.

THE COURT: Well, I don't know, Mr. Hruska.

All right, you are entitled to that.

MR. HRUSKA: If counsel wants to bring it out --

THE COURT: Let me say this, though: I would like to have the parties bring out what sort of system there is. I assume that it doesn't just stop at that; that the television networks don't report a certain number of performances; that there must be some rationale by which this subject is covered, and if you know what that rationale is, Mr. Marks, I would like to hear it.

THE WITNESS: Yes, your Honor. The rationale

is that in the great majority of cases these rights have been granted directly to the agency. In fact, many of these writers are agency employees.

THE COURT: I take it from the totality of what you say and what Mr. Hruska asked, he seemed to imply in his last question that he doesn't dispute the fact that that may be true in a lot of instances, but that he suggests to me that there are instances in which the writers' consent is necessary, and in such instances perhaps the networks do advise you so that you can do something about it. Now, he can't testify; he is not a witness.

THE WITNESS: Yes, your Honor, there are instances where rights have been reserved, and where we may be notified by the network.

If Mr. Hruska is asking me whether we are always notified by the network in those cases, I don't know.

THE COURT: I don't think the question is whether you are always notified because you can fail to be notified in other instances where it is clear you ought to be notified. I think the question is what is the system? Are you supposed to be notified in those instances?

THE WITNESS: Yes, we are.

THE COURT: And in general, so far as you know, are you notified in the instances in which you are supposed to be notified?

THE WITNESS: I don't know the answer to that, your Honor, because we do have --

THE COURT: You suggested by your testimony, to me anyway, that there was a greater percentage of failure to report about this category than other categories.

THE WITNESS: That is correct, your Honor.

THE COURT: And the further indication was that that greater failure to report in this category was not limited to the instances in which it was irrelevant but applied also to the instances in which the networks were supposed to make a report. That is, as I understand it, we have got to divide this music-in-the-can situation into two types of instances: those in which the advertising agencies are already licensed to use the music, in which ASCAP has no interest and therefore there is no point in informing you, and those instances in which the rights are reserved, as you put it, in which case ASCAP or somebody has to license CBS and therefore it is proper and perhaps obligatory for CBS or for the networks

to report to you.

Are you suggesting that in that last category the times when they ought to be reported to you, as distinct fromthe times when it doesn't make any difference, that there is a higher percentage of failure to report than there is in other situations in which they are obligated to report to you?

THE WITNESS: Well, I don't know whether it is, generally speaking, higher. I know that there are certainly occasions where they don't report where the member at least tells us that they should have reported.

Now, in some of those cases when we look at the agreement we find that maybe the member is wrong and that the network is right and they need not have reported because the rights have been --

THE COURT: Well, what I am trying to get at -- I am getting more information as I go along but what I would like to try to do is see if I can nail this thing down. Here is the scope of the proposition you are trying to put before us, namely, the fact that in the case of music in the can, jingles, as distinguished from other situations, a large percentage of the absolute number of jingles is licensed through the advertising agency, whereas that is not true about other kinds of

music.

THE WITNESS: That is correct, your Honor.

THE COURT: And the other question of failure to report in such instances where there should be reports is peripheral; is that not so?

THE WITNESS: I believe so, your Honor, yes.

THE COURT: I didn't mean to get you off on another track.

MR. HRUSKA: No, it is in the same area, your Honor. I am a little confused about one thing Mr. Marks said though in that line of questioning.

THE COURT: Since you are confused and it is quarter past 3, can we take a short recess?

MR. HRUSKA: Sure.

(Recess.)

BY MR. HRUSKA:

Q Mr. Marks, isn't the normal arrangement on the reporting of use of music on commercials that the network does not report to ASCAP unless the member in interest, the ASCAP member in interest, reports to the network? Isn't that the normal arrangement?

A Well, as I mentioned, we have had to ask our members to notify the network, notify the agency and the network, in order to have them report. I don't know what could be considered normal. The obligation of CBS is to report the music used under the ASCAP license.

Q But isn't it customary over the years that the network does not report these uses unless the ASCAP member in interest or the advertising agency reports them to CBS?

A Well, I can't know what the CBS practice has been. I can tell you that we have asked our members where the rights have been retained to have the agency notify the network to notify ASCAP.

THE COURT: Am I correct in understanding what you mean is you know you get some information but you don't know what prompts CBS to send you that information?

THE WITNESS: That's correct.

THE COURT: They don't say, "We are sending

this because," they simply send it to you?

THE WITNESS: Right, your Honor. Some of it will come in on the program --

THE COURT: There ought to be clear agreement on this. What is the governing instrument or provision which determines whether it is CBS' obligation to report this information to you or not?

THE WITNESS: The agreement, the performing rights agreement between ASCAP and CBS.

MR. HRUSKA: The blanket license.

THE COURT: What does it say? Does it say anything about this kind of music in particular or, as you suggested a moment ago, does it simply require CBS to report its use of ASCAP music?

THE WITNESS: My recollection, your Honor, is that it talks about ASCAP music generally. I don't really recall.

MR. HRUSKA: It is one of the reasons, your Honor, I was getting to the custom.

THE COURT: It is perfectly proper for you to do so, but I don't know that Mr. Marks can answer the question about what CBS does. I think you may have to put your own witness on or get a stipulation.

MR. HRUSKA: I thought that Mr. Marks was

familiar with the custom.

THE COURT: I understand.

BY MR. HRUSKA:

Q Turning again to AX233, I note that when a qualified -- excuse me. Is it qualified or qualifying work? What is the proper term?

A Oh, I may say qualified work. I don't know what the formula -- whatever it says in the formula is the appropriate term.

Q I thought it was qualifying.

A Well, a qualifying work becomes qualified when it has a certain amount of credit.

Q A qualified work as to which there hasn't been any lyric change, when that is used as background music to a commercial it earns 50 per cent of a use credit?

A That is correct, if it is fully qualified, right.

Q And to that use credit are applied the various multipliers to get to the number of performance credits, and the distribution is based upon the cash value of the performance credits, right?

A Generally speaking, that is the progression.

Q The code 26 category, which is music written originally for the commercial or previously published

music which has been altered in some way, lyric change, receives only 1 per cent of a use credit, right?

A That's correct.

Q Why that big difference, fifty to one?

A Well, here again, we are talking about an accommodation of relative values. Where a work has been written originally for the jingle, for the commercial, it is usually done by someone who has a continuing relationship with the agency, maybe an employee, maybe someone whom the agency retains on a regular basis to write these commercials and gets paid for writing the commercial.

Q May it also be somebody who has been retained specially to write this particular commercial?

A Might be. But in the main, where the agency is having a number of commercials written, as all agencies are, they have to look to people on a regularly -- on a fairly steady basis, and they are going to look to either employees or someone that they have dealt with over a period of time whose work they like.

Q Just on that point, how do you know that? What is your basis for assuming that?

A Talking to writers who have written jingles for agencies and talking to agency people over the years.

THE COURT: I find this interesting just as

an outsider learning about this industry, but I don't understand the validation, if there needs to be one, for the difference in rates on this schedule, I don't understand the relationship of that to the issues of the case.

MR. HRUSKA: Let me bring it out with specific questions, your Honor.

BY MR. HRUSKA:

Q Isn't it true that a major factor or perhaps the largest factor for the fifty-to-one difference in these two categories, 61 and 26, is because in the 61 category you, ASCAP, expect that the writer, the owner of that music, will not have been paid by the advertising agency, whereas in the 26 category you will expect that the owner of the music or the writer of the music will have been paid by the advertising agency?

MR. TOPKIS: Your Honor, I have no objection to Mr. Marks expressing whatever opinion he may have on this subject, but since these rules evolved from, if I may use the term, a political fabrication, participated in by many people, the Department of Justice, approved by Judge Ryan, I can't imagine how Mr. Marks can purport to speak for the multitude's decision. He may have his opinion.

MR. HRUSKA: Mr. Marks did speak this morning of his opinion on why, for example, qualified works

were paid at such a higher rate than nonqualified works.

THE COURT: You didn't make any objection to that, and I don't think that should be the sole test, but I will be free to say that whoever asked the question of why people were paid certain amounts doesn't seem to me to have brought very much light to the question of the issues of this case, as I see it.

I could go along with Mr. Topkis educating me on the complexities of this because the complexities may have something to do with whether it is feasible for another system to go into effect or not. But beyond that, I don't understand. It is very interesting to hear somebody gets paid 50 times as much as somebody else does.

MR. HRUSKA: I am getting into this, your Honor, only to bring out another point related to this, this area of commercials in the can.

THE COURT: If you are getting into something that you think is going to cast light on the problems relating to commercials in the can I will allow it.

MR. HRUSKA: I will hear Mr. Marks' answer, but it has to be of limited value since it is only his personal opinion.

Will you read back the question, please.

MR. HRUSKA: I could restate it. I think it would be just as fast.

THE COURT: All right.

Q Isn't the reason for the 50-1 disparity in payments made in respect of categories 61 and 26, the fact that in 26, where the use receives only one per cent of the use credit, you will expect that the writer of the song or the owner of the song will have received money from the advertising agency up front of the use of that music, whereas in Category 61, you have no such expectation?

A Well, a shorthand answer is no. But let me explain the reason. If anybody has received money up front for the use of the song, then the rights would probably not have been reserved. What we are talking about here is a situation where the rights have been reserved. But there may have been some compensation for writing the work in the case of a jingle that is written directly for the commercial. In the case of one that has been changed, where the lyric has been changed, there may have been some payment for the right to change the lyric. This may be a factor in the difference. And, of course, the use of an ASCAP work taken from the repertory that has a history of feature performance credits is felt to be a valuable use, more valuable than one where the work is written directly or where the lyric has been changed and the member has received payment for the change.

Q Have you ever heard of an occasion where the owner of published music which has been used on a commercial with a lyric changes has not received payments for the right to make that lyric change and the right to use on the commercial, record on the commercial?

A No. I don't think I have implied that on that occasion he wouldnot receive. Just the opposite.

Q Just the opposite, you would expect that when a publisher of a piece of music gives the right to the advertising agency to record that song in the commercial and change the lyrics that he would get money for that?

A That there very well may be payment for that change of lyric.

Q And when somebody writes original music for a commercial that that writer will receive money up front for the act of sitting down and writing that music?

A That's correct, I would expect that, unless he were just on salary for that purpose.

Q In your opinion, is the fact that ASCAP does not receive more reports from its members regarding the use on television of jingles in Category 26 attributable to the fact that the distributions are so small, one per cent of the use credit, that it is not worth the while of the

members involved?

A My opinion based on discussions with writers and with agencies is that the amount of money which the writer gets from the agency for writing the commercial is so much greater than the amount that would be forthcoming on a performance basis of the jingle that the writer does not raise a very great fuss about the retaining of performing rights. The agency is concerned about protecting the sponsor and --

Q That wasn't my question.

MR. TOPKIS: May the witness finish his answer?

THE COURT: I think the answer overlaps the question. It doesn't answer it directly.

You have indicated, Mr. Marks, by your answer that you think the major fact in the mind of the writer is the amount of money he gets when he is paid for writing the jingle.

THE WITNESS: That is correct.

THE COURT: But Mr. Bruska asked you about it from the other end, which was whether the major factor for his not pleasing this situation is the minimal amount that he gets as a royalty. It seems to me one is pretty well implied in the other.

THE WITNESS: It is, but there is another factor here, and that is that writers are very anxious to receive credit for what they are entitled to receive credit for, and if they have retained the rights, even though it is only a one per cent use, they will often make a big fuss if they don't get the credits for that one per cent use, because they are very concerned about seeing on their statements the works that they have written where they are entitled to get payment for it.

So that we have a number of writers making complaints that they have written jingles, they think they have reserved the rights, and they haven't gotten payment, even though they know it is one per cent.

Q But you don't know what percent of the total those complaints represent?

MR. TOPKIS: Total of what?

MR. HRUSKA: Total of jingles used on network television where the advertising agency did not possess a right to license the television network involved.

THE COURT: It would surprise me greatly if he did know what percentage it was.

MR. TOPKIS: I will stipulate that too.

MR. HRUSKA: I think that is true, but I would

like tohear Mr. Marks answer.

THE WITNESS: I would like to know what the question is. I really, I guess, am the only one who didn't get it.

Q You talked about complaints that you had received and you said that writers often complain to you when their music was being used in jingles in situations in which they were entitled to ASCAP distributions for the use of those jingles, right?

A That's correct, whether they are one per cent jingles or other.

Q All right.

MR. TOPKIS: May the witness please finish?

MR. HRUSKA : He did.

MR. TOPKIS: He was saying whether they are one per cent jingles or something, at which point counsel interrupted him.

MR. HRUSKA: No.

THE WITNESS: I said "other," but I swallowed that. He overlapped the "other."

THE COURT: Let's go along.

Q So that occurs often. What I have tried to establish, Mr. Marks, is that you do not know, do you, the percentage of the total represented by those complaints,

and by the total I mean the total use of jingles on network television where the advertising agency did not possess the rights to license the television network involved.

A As I said before, my experience in talking to writers, writers of jingles, is that they want that credit if they write the jingles.

MR. HRUSKA: Your Honor, I think I am entitled to a yes or no answer to that question.

THE COURT: Mr. Marks, I don't blame you if you don't understand the question, but the question is susceptible of a yes or no answer, and I think Mr. Hruska is entitled to it for whatever use he wants to make of it .

The concept is simple. The ability to express it may not be so easy.

We all agree that there are jingles used on the air to which writers have a right to a royalty through ASCAP.

THE WITNESS: Right.

THE COURT: You also have said that you receive complaints from your writers that they don't get such royalties or that they are not reported, right?

THE WITNESS: Right.

THE COURT: The question Mr. Hruska is asking

is how do you know or do you not know what percentage of the total occasions in which such jingles are entitled to royalties are represented by the occasions of complaint.

In other words, do the jingle writers who are entitled to royalties complain one out of ten times, one out of twenty times, five out of twenty times, or do you know?

THE WITNESS: I don't know.

THE COURT: That is all he wants to establish.

MR. HRUSKA: That is all.

THE COURT: Mr. Marks, we are entitled to ask you to keep your further views to yourself until your own counsel brings them out.

End 4B

THE COURT: I may say I take it as no reflection on you that you don't know. I certainly would be surprised if you did know.

Q What proportion of the total number of contracts sgned between advertising agencies and writers of original music for commercials have you seen, would you estimate, in say the last five years?

A Well, if you limit that to contracts governing jingles that are written by ASCAP members, my experience with ASCAP members is that we would have seen a high proportion of those contracts or at least samples of them.

Q How do you know you have seen a high proportion?

MR. TOPKIS: How do you know what?

I'm sorry.

MR. HRUSKA: Mr. Marks said he saw a high proportion of them.

THE COURT: On what does he base that?

MR. HRUSKA: On what does he base that.

A I base that on my contacts, having worked with ASCAP writer-members for the last 12 years or so, and the pervading feeling that I have mentioned before that if they had written music to which they believed they are entitled to credit for performance, they are extremely likely to come in and let us know that those performances have

taken place if they don't see those performances on their statements.

Q I guess my problem with that answer, Mr. Marks, is I don't see how you can possibly know that unless you know what proportion of the total number of such contracts you have seen, and my question is, on what do you base your testimony that you have seen the preponderance of those contracts?

A Well, excuse me for not accepting your premise. What I am saying is that I am basing it on my contacts with writers and what I think the normal writer feeling is, not on the knowledge of the total number of agency contracts that are extant.

I don't know the total number of agency contracts that are extant.

Q You personally look at a certain number of these contracts every year, do you?

A I have over the years, yes.

THE COURT: What would be the occaion for you as director of operations to look at these contract, Mr. Marks?

I am not doubting you. I just want to get the feel of the situation.

THE WITNESS: Right, your Honor. When I was

distribution manager I looked at a good many more than I do now. The occasion now would be a question that arises in the mind of the distribution manager as to whether or not a contract does or does not reserve performing rights.

Q So you would look at it when a member complained in a circumstance where the member believed that he ought to be getting distributions for a television use of a commercial?

A Under those circumstances I might look at it or if a contract has come in in response to a letter we had sent indicating that the commercial was indexed and we would like to see a copy of the contract, and some doubt arose in the mind of the person who is looking at the contract, the question might come up to me at this point.

Q How many such contracts did you read during the last year?

MR. TOPKIS: During what?

MR. BRUSKA: During the last year.

A Oh, I would say at least half a dozen to ten of them.

Q About ten. Do you keep a file of these?

A Files are kept. I don't keep a file.

Q If you wanted to dig one out, who would you ask to get it?

A Our distribution manager usually.

Q And out of the ten you read last year, as to how many of those contracts did you conclude the writer involved was entitled to distributions?

A I don't recall what the percentage was in the ten. By the time they get to me there's -- usually the situation is that there is some claim of reservation that's in doubt. They are more likely to have made the reservation than not.

MR. HRUSKA: I think, your Honor, we ought to see the contracts involved that have come to ASCAP from writers who have been claiming that they were entitled to ASCAP distributions for the use of jingles.

THE COURT: What would that illuminate except that they are either right or wrong?

I am perfectly prepared to believe that some people are entitled to royalties and some people are not.

I quite understand the point made and I think it is significant of the fact that a significant number of jingles are played on the networks where the license comes from the advertising agency rather than from ASCAP.

I am not trying to preclude your having everything you want but what will I learn from them?

MR. HRUSKA: Well, we are attempting to establish

in this case that there are a significant number of commercials as to which the right to make a network performance does not come from the agencybut comes from ASCAP; and Mr.Maks has seemed to express some opinions to the contrary effect.

Your Honor, I would be perfectly prepared to stipulate that there are a signficant number of commercials using music originally created for the commercials.

THE COURT: Actually it does not seem to me that it really makes any difference how many there are which are licensed by the agencies.

What is important to me is how many there are that are not licensed by the agencies.

MR. HRUSKA: Exactly, and whether or not that is an appreciable number.

THE COURT: I don't think I will learn very much about that, however, by looking at half a dozen or ten contracts.

MR. HRUSKA: I agree.

The only thing we learn about that is the basis for Mr. Marks' opinion.

THE COURT: Well, even his opinion has not-- I don't want to deprecate it in any way, it does not seem to me to go very far towards establishing how many or how few there are. There are just a lot that are not; and

I think both sides are at some sort of difficulty here because there don't seem to be any hard figures on this point.

MR. HRUSKA: Difficult to quantify.

THE COURT: Or if there are they haven't been developed by the discussion today. It is just a general impression.

Q Yesterday, Mr. Marks, you testified about voting procedures within the ASCAP organization.

Let's take publishers, for example. You said that the publishers elected 12 publisher members of the ASCAP board?

A That is correct.

Q That is not a one-man, one-vote type of voting procedure, is it?

A It is a weighted vote.

Q A weighted vote?

A Depending upon the performance credits that a particular publisher has.

Q Current performance credits?

A That is correct.

The same thing applies on the writers' side.

Q When was the last election held in ASCAP?

MR. TOPKIS: When was what?

Q The last election held in ASCAP.

A A few months ago.

THE COURT: For what, director?

THE WITNESS: For board of directors.

THE COURT: Annual elections?

THE WITNESS: Every two years the board of directors is elected and in the alternate years the board of review is elected so there is an election every year.

Q On the board elections, just to get an idea of the quantities involved here, let's take Warner Bros. I gather Warner Bros. is the top publisher-distributor, the Warner Bros. group of publishers?

A That is correct.

Q How many votes did Warner Bros. or the Warner Bros. group receive?

A Offhand I don't know but each publisher is limited.

Q I misstated the question. I don't mean receive in the sense of having a Warner Bros. representative on the board.

THE COURT: You mean how many was it entitled to cast?

Q How many was it entitled to cast?

A That is the way I interpreted the question. As

I say, I don't know the exact number, but there is a limit of a hundred votes that any one company in a group can receive.

Q Do you know how many publishing-- any one company within the group?

A That's right.

Q So if Warner Bros. has five companies they might hae five hundred votes?

A They might but they don't. As a matter of fact recently they merged a number of their companies and I think they have lost votes.

Q Do you remember roughly the top number of votes which a publishing group within ASCAP was entitled to cast in this last election?

A No, I don't.

As I say, I don't recall what the votes per group or per company were.

Q Typically the major ASCAP publishers consist of publishing groups, don't they?

A There are a number of publisher groups and then there are independent publishers that are also in the group of the top publishers.

THE COURT: When you speak in terms of group I understand what the Warner Bros. group is, at least I think

I do. That means the companies are all owned or controlled by Warner Bros., is that correct?

THE WITNESS: That is right.

THE COURT: Is that what you both mean by groups?

MR.HRUSKA: I believe so. That is what I mean, your Honor.

THE WITNESS: That's right, there may be.

THE COURT: Affiliated companies?

THE WITNESS: That is correct.

Q Shapiro Bernstein, for example, would have a half a dozen or a dozen affiliated companies?

A Well, that's a bad example. Shapiro is pretty much an independent company. They may have one smaller company that is associated with it but --

Q Well, all right, I don't want to debate the point. Mr. Brettler will testify to it.

Let's assume that a publishing group has five hundred votes. Is that five hundred votes per each one of those twelve seats or is it five hundred votes to distribute amongst the seats?

A No, the way the vote is computed or cast, each member has a right to cast all of its votes for as many members who can be seated; that is, that they can cast, if they have got five hundred votes or fifty votes, they can

cast five hundred fifty or fifty for each of the people running up to the total number of people who can be elected.

By the way, I don't think that there is any group that has five hundred votes.

Q Well, I just picked a figure out of the air.

Staying with the five hundred, five hundred times twelve seats is six thousand?

THE COURT: That would be six thousand.

Q Six thousand, right.

Assuming Warner Bros., this Warner Bros. group has six thousand votes, can they parcel out those votes?

THE COURT: I think what you are really asking is do you have cumulative voting?

Q Cumulative voting, right.

THE WITNESS: No, your Honor. If you are asking whether they have got five hundred or fifty can they --

Q Use one or the other.

A One or the other. Can they cast more than five hundred or fifty for any one member?

Q Right.

A No.

Q Can the 20 top publisher groups in ASCAP elect the entire board of publisher members?

MR. TOPKIS: Is that a question of mathematics?

THE COURT: Yes, I take it that it is. In other words, you are asking do their votes add up to a majority or whatever number is required.

Q Yes. Right.

If you know, of course?

A Yes. I don't know. I do know that the amended final judgment has a provision which limits the growth in the total publisher vote that the members-- member companies represented on the board of directors.

Q To 40 per cent?

A I don't recall the figure but there is that kind of provision in the judgment.

Q That is 12 members of the board limited to, let's assume, 40 per cent. Would you happen to know offhand whether adding the next eight largest publishers, adding their votes, would constitute a majority of the publisher votes?

A I wouldn't know offhand but it might.

THE COURT: I am not sure what all these refinements mean but while we are at refinements, is the board elected by majority vote or is it greater than majority vote?

THE WITNESS: The actual election is -- it is not -- it is not a majority, it is the first 12 in the order of voting, three having to be --

THE COURT: It could be a plurality?

THE WITNESS: Could be a plurality.

Q And three publisher members of the board are elected at each election; is that how it is done?

A No, no. The three that I mentioned were the three serious board members from serious publishers who run on a different track, and they are not competing for votes with the popular.

MR. BRUSKA: I may skip around a little bit on subject matter because I tried to pick these off as they were mentioned.

Q You said something yesterday about 1400 3M

locations, locations having a 3M player. Did you mean to confine that to the 3M M-1200 series?

A I believe so. I think that's the one that we have licensed.

Q In other words, that 1400 figure does not include the 3M customers having the M-700 player?

A You mean the ones that were licensed directly?

Q Right.

A Yes. No, I don't -- that was not meant to include that.

Q You talked about infringement actions yesterday, copyright infringement actions, which you said were brought in the name of the copyright owners involved. Is it true that ASCAP finances, direcrs such litigation?

A No. What I said yesterday was that the society brings those actions and pays for the bringing of the actions, and the recoveries go into the general fund, but that the cost of bring those actions, sustaining them, exceeds the cost of recovery.

THE COURT: We are talking now about in whose name they are brought.

A And they are brought in the names of the members themselves.

THE COURT: But that is all that the member

contributes to the situation, his name? He is the assignee of the cause of action?

THE WITNESS: Yes, your Honor, under the membership agreement.

THE COURT: That is what Mr. Hruska is asking.

MR. HRUSKA: Yes.

BY MR. HRUSKA:

Q You talked yesterday about the various uses to which you put your data processing equipment or computers. Do you use your data processing equipment to send out mailings to your members?

A Yes, the royalty payments, distribution payments are addressed by data processing.

Q How many mailings does ASCAP have a year to its members?

THE COURT: You mean regular?

MR. HRUSKA: Yes, your Honor. Or perhaps on the average including any regular and unusual.

THE COURT: You mean membershipwide mailings?

MR. HRUSKA: Membershipwide, right.

A There are four domestic distributions. Those are all mailings.

Q Those mailings go to all ASCAP members whether

they are to receive actual distributions or not?

A That is right. They are given a statement that would indicate thatthere are no surveyed performances, if that's the fact.

Two foreign distributions. There are other mailings during the year of various kinds. These would not have been -- those other mailings would not be computer mailings. They are done by Addressograph.

Q Such as?

A Well, I mentioned the fact that the report of the court-appointed distribution advisers goes out twice a year with the commentsof the society. There are mailings in the event that there are any changes of rules contemplated. Those go out to the members.

There are mailings of our magazine, ASCAP Today, which goes out to the members.

Q How often does that go out to the members?

A Two or three or four times a year, depending upon the budget that's established for the magazine.

Q Any others that you can think of?

A Well, there are occasions when we send out information as to newly licensed stations, there mailings to stations of restricted lists.

Q No. I am sorry. I am confining it to

mailings to members.

A Members?

Q Yes.

A Those are the kinds of mailings that will go out. And there may be a message that goes to the membership from the president's office on some particular -- keeping them advised of copyright legislation, that sort of thing.

Q You also testified yesterday about audits conducted by ASCAP accountants on the books of various licensees who had agreed to pay ASCAP a certain percentage of their income. Do you remember that?

A Yes, I do.

Q You said that ASCAP collected a lot of money as a result of those audits. In those circumstances where ASCAP collected money as a result of those audits, would it be normal for ASCAP to indicate to the licensee involved that if a satisfactory adjustment of the claim were not made ASCAP would institute litigation against them?

A Well, it may come to that point. Most of those audits are settled as a result of showing the licensee what the audit claim is. Getting his side of the story. If there is a difference of opinion, it might be necessary to visit the station, have discussions on the

audit, eventually settle and have some terms on the settlement.

Now, I said that I did mention a large sum of money that comes in in the audit claims, but there is a considerable expense also in performing these audits.

THE COURT: I think we are getting off the track. All I understood Mr. Hruska to ask you, Mr. Marks, was whether you usually threatened suit when you wrote to a licensee and told them they owed you some money.

MR. HRUSKA: I didn't say threatened; I said indicated the prospect of litigation in the event the matter could not be settled peacefully.

THE COURT: What doyou include in your form letters, No. 1?

THE WITNESS: Well, I don't think that the audit situation, the audit collection situation is really a normal situation, your Honor. There is no point in threatening suit at that point. It is a question of --

THE COURT: Then am I correct in saying the answer to the question is that you don't?

THE WITNESS: Unless you come down to a point where you want --

THE COURT: No, right at the beginning, he

said.

THE WITNESS: Oh, if it is at the beginning, at the outset, then no, no, that is right, we don't.

MR. HRUSKA: I meant anywhere in the chain.

THE COURT: It seems to me obvious that you may have to under some circumstances, and I don't really understand that I get very much from all this. I suppose the answer is that in some instances you have to apply more pressure than in others, but in general I understand that they are being settled, is that it?

THE WITNESS: Yes, your Honor.

MR. HRUSKA: That is what I wanted to bring out, your Honor, that these were settlements.

Q You talked about Mr. Dean designing the ASCAP survey or an ASCAP survey in 1959. Prior to that did ASCAP conduct surveys that were designed by other people?

A Yes, yes, there were surveys prior to that time.

Q Do you know how far back in years those surveys went?

A Well, my recollection is that up to -- you now when the society got started in 1914 there was very little, if any, money coming in, and it took a long time

before a body of any considerable songs came into it so that it wasn't feasible to have a survey at that point of time. In fact, radio was just developing, and the writers and publishers classification committees would meet and assign rankings to the members. Certain members were in certain classes.

It wasn't until some time in the '40s, I think, and maybe early '50s, that the surveys began, probably in the '40s; maybe earlier than that, as radio took hold, network radio.

THE COURT: Would this be a good point to break? We are right at the witching hour.

MR. HRUSKA: Fine, your Honor.

THE COURT: I heard what you said about the difficulties of cross examining on some material, but I would like you to bear in mind that I would very much prefer to have you complete your cross examination of Mr. Marks tomorrow, if that is possible. I don't favor the idea of breaking up cross examination. I am sorry we had to do it in the case of Miss Preston but we couldn't avoid it. So I hope we can finish it up.

All right, gentlemen, I will see you tomorrow morning.

(Adjourned to May 31, 1973, at 10:00 a.m.)

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Date	Page	Line(s)	Error	Change to
			May 30, 1974	
2459	10		m ake	make
2459	19		t he	the
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2462	3		member ship	membership
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2463	12		know	don't
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2470	2		wi th	with
2472	4		ccan	can
2473	17		statoin	station
2477	8		HUGHES	HRUSKA
2482	21		become	come from
2484	2		willnot	will not
2487	14		"them"	"theme"
2487	15		them	theme
2487	24		feat u.e	feature

Page	Line(s)	Error	Change To
2489	7	were	with
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2489	10	Sothat	So that
2489	13	cor rect	correct
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2489	20	That is	Thanks
2489	24	vary ing	varying
2491	14	them	theme
2492	11	T E	THE
2493	6	t his	this
2495	5	futher	further
2495	6	T wo	Two
2495	11	jusic	music
2497	18	we	with
2497	18	regarded	regard to
2498	23	medi a	media
2499	14	var ious	various
2499	17	illustr ation	illustration
2501	6	weight ed	weighting
2507	25	to go or months to go	ago or months ago.
2511	21	whochange	who change
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Page	Line(s)	Error	Change To
2518	25	distributal	distributable
2519	2	int othe	into the
2519	6	choce	choice
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2521	4	failes	fails
2521	16	receive	receives
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2522	9	wh' chis	which is
2522	14	TTHE	THE
2522	14	therewere	there were
2524	11	s niority	seniority
2528	3	lets	let's
2529	2	Dr.Fisher	Dr. Fisher
2529	16	isnot	is not
2529	19	volume	voted
2531	18	forhim	for him
2532	9	perform ance	performance
2533	11	7 1765	1765
2533	25	r ight	right
2534	14	r esign	resign
2537	8	effcts	effects
2538	4	JRUSKA	HRUSKA
2538	7	may be	maybe
2541	6	adqquately	adequately
2541	18	higheer	higher
2542	21	APA-Phenix	APA-Phoenix

Page	Line(s)	Error	Change to
2543	24	Exhibit 234	Exhibit AX234
2544	20	or iginally	originally
2546	18	bro ken	broken
2546	20	songle	song
2549	7	mahy	many
2550	3	bu tthe	but the
2550	7	youassume	you assume
2551	24	impor tant	important
2552	12	report s	reports
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2556	4	Firsr	First
2558	22	uin	in
2561	24	on0line	on-line
2563	3	I became	IBM's
2563	11	less	other
2564	3	reach	increase
2564	4	deal along with the bills before	deal, along with the bills, before
2565	24	Hruska refine	Hruska may r fine
2567	20	plant	plan
2567	21	print out	printout
2567	25	print outs	printouts
2569	23	disseminate	designate
2571	1	direct	cross
2572	1	direct	cross
2572	3	youknow	you know

Page	Line(s)	Error	Change to
2572	12	now	not
2573	1	direct	cross
2573	9	Thatis	That is
2574	15	descript ion	description
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2577	25	p lus	plus
2579a	2	Guinness	Gyenes
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2584	17	wasn't	was
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2590	23	inwhich	in which
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2593	14	reportthese	report these
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2598	23	MR. HRUSKA	(omit)
2600	4	changes	change
2600	8	wouldnot	would not
2601	23	pleasing	pursuing
2602	14	oner	one
2602	19	didnot	did not
2603	2	tohear	to hear
2606	3	onyou	on you
2606	6	sgned	signed
2607	20	occaion	occasion
2610	4	agencybut	agency but

Page	Lines(s)	Error	Change To
2610	4	Mr. Maks	Mr. Marks
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